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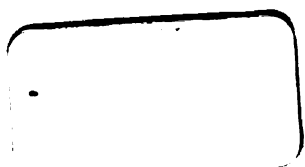
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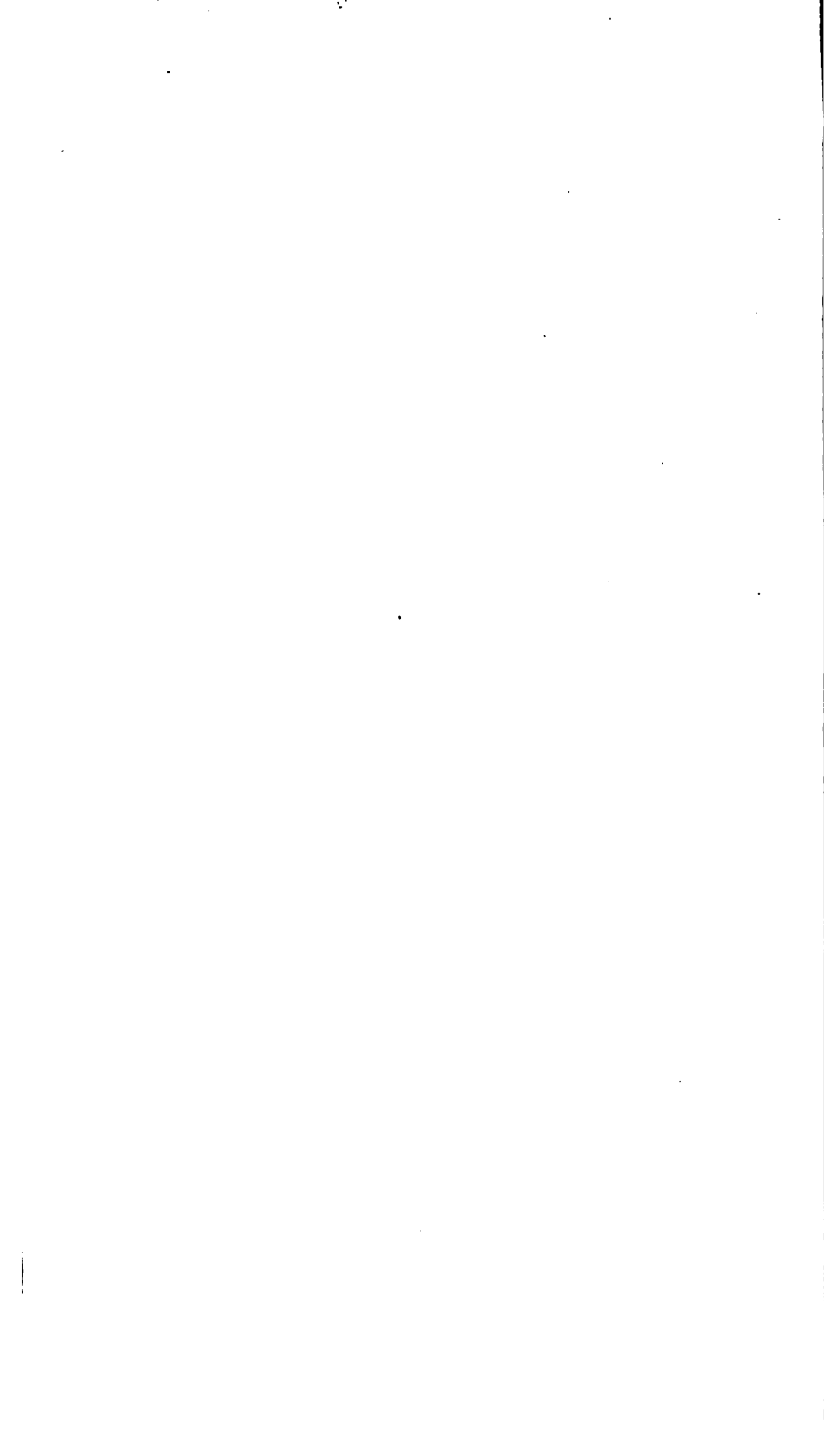
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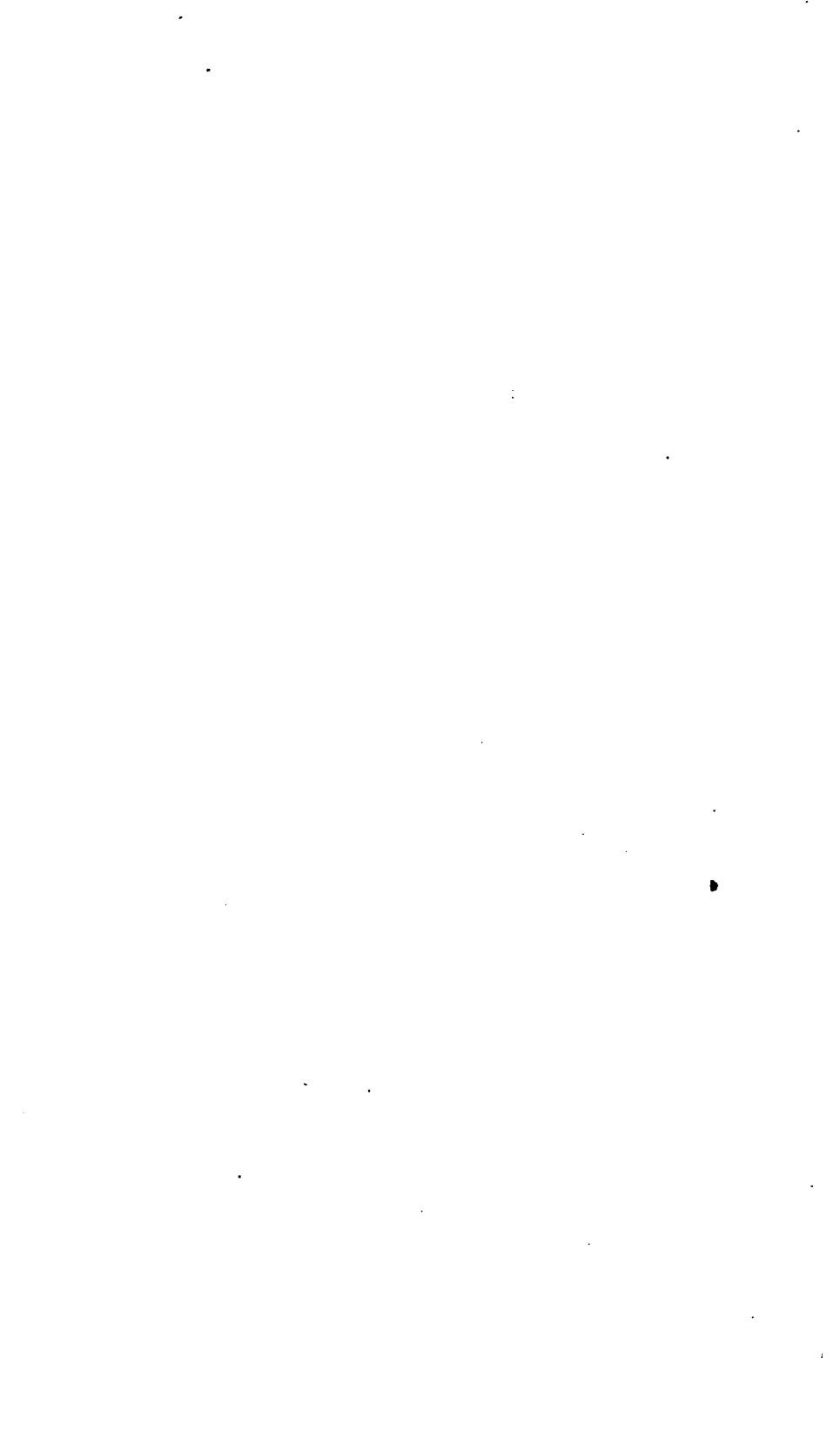
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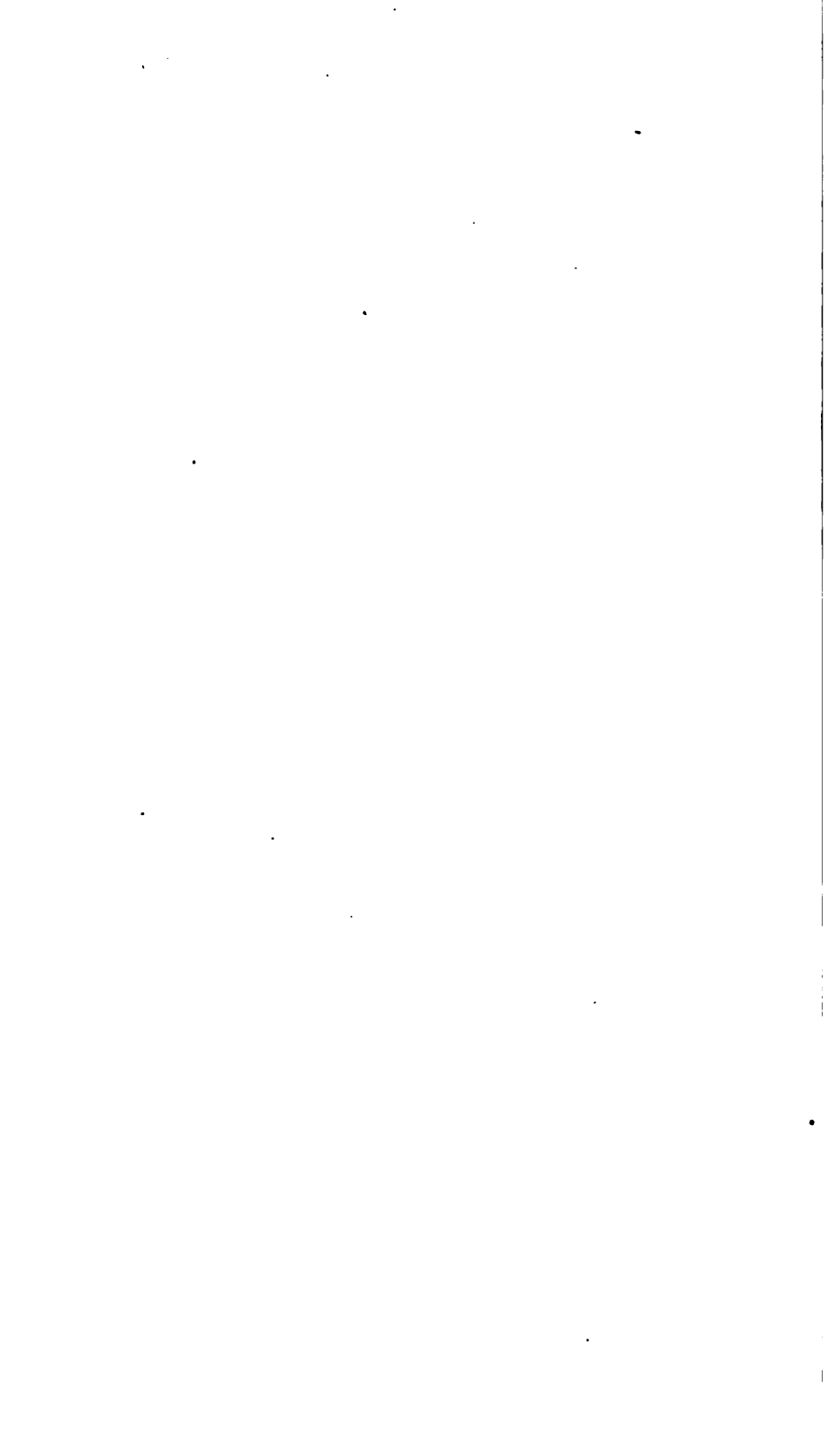
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THE
AMERICAN DECISIONS

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

**FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1869.**

COMPILED AND ANNOTATED

By A. C. FREEMAN,

**COUNSELLOR AT LAW, AND AUTHOR OF "TREATISES ON THE LAW OF JUDGMENTS,"
"COVENANTS AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.**

VOL. XCIX.

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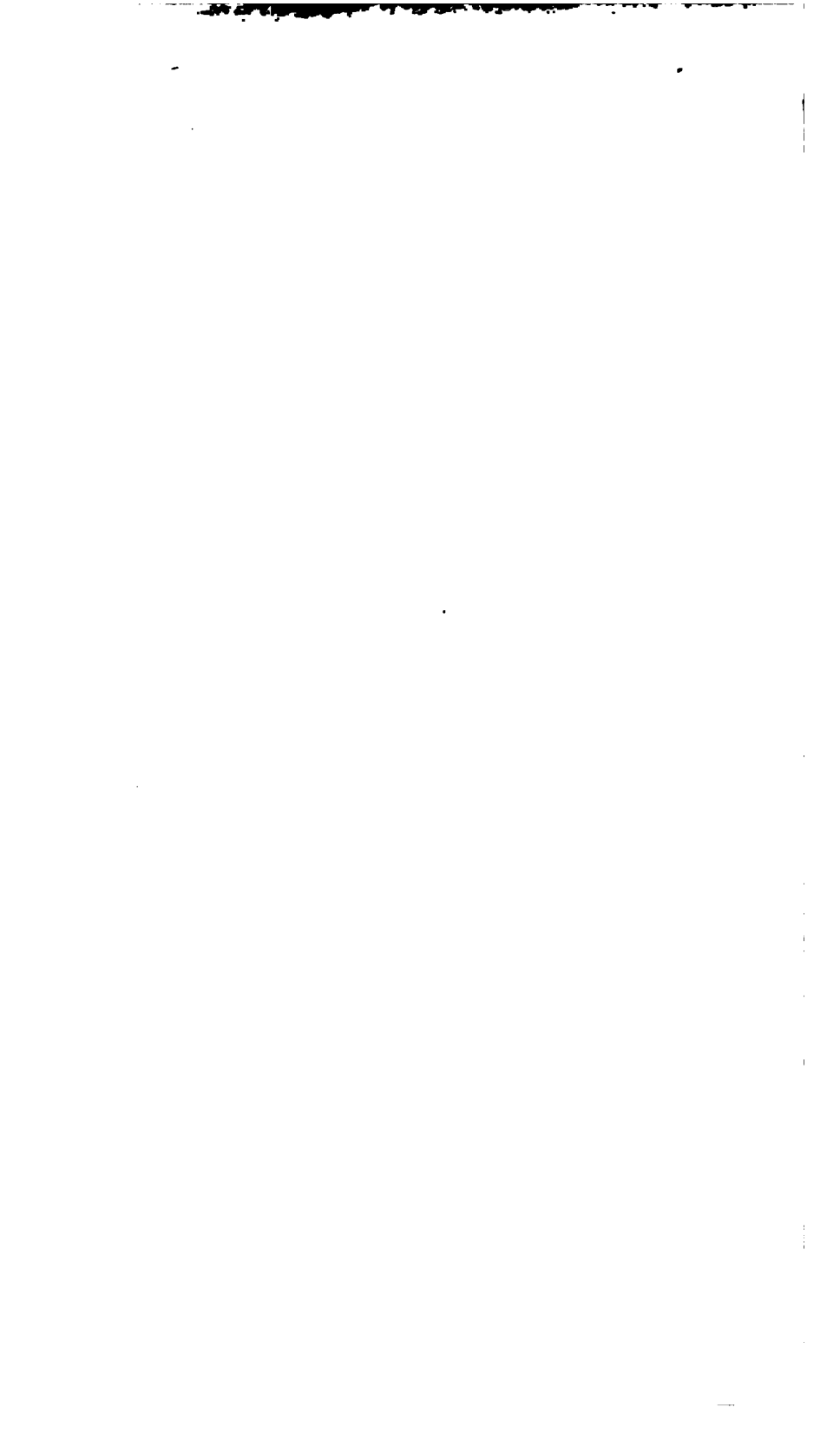
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AMERICAN DECISIONS.

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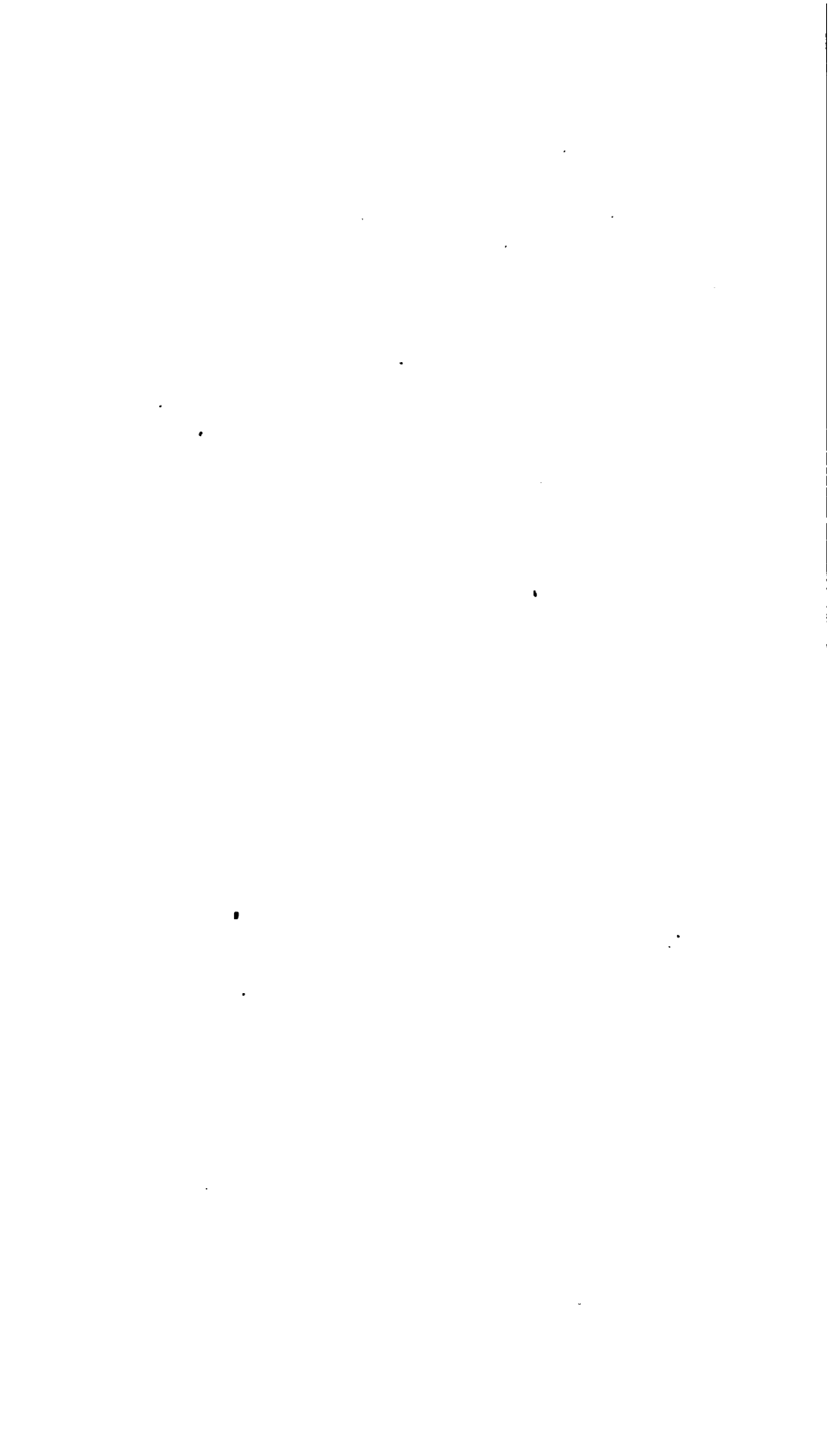
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AMERICAN DECISIONS.

VOL. XCIX.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

SAWYER v. CHICAGO AND NORTHWESTERN R'y Co.

[22 WISCONSIN, 402.]

TEAMSTER EMPLOYED BY MILL-OWNER TO DELIVER FLOUR TO RAILROAD COMPANY for transportation has no power by virtue of his employment to direct the delivery of the flour by the company to a third person; and the agents of the company are bound to know this, and if they so deliver the flour, the company is liable as for a conversion.

STATEMENT OF TEAMSTER IN EMPLOY OF MILL-OWNER THAT FLOUR DELIVERED BY HIM to a railroad company was "for" a certain person does not imply that it was to be delivered by the company to him without further instructions from the owner.

CONTRACT FOR SALE OF THREE HUNDRED BARRELS OF FLOUR, to be delivered in lots of one hundred barrels, each lot to be paid for on delivery, is severable, and delivery and receipt of payment for the last two lots do not constitute a waiver of any rights of the seller arising out of an unauthorized delivery of the first lot by a railroad company to the purchaser without payment made.

ERRONEOUS INSTRUCTION NOT PREJUDICIAL IS NOT GROUND FOR REVERSAL.

ACTION for damages for the alleged conversion of one hundred barrels of flour delivered to the defendant railway company for transportation, subject to plaintiff's order, and delivered by the company, without authority, to one Tilton, who shipped it out of the state and converted it to his own use. The plaintiff, who was a mill-owner in Milwaukee, agreed, by oral contract with Tilton, to sell him three hundred barrels of flour at eight dollars per barrel, to be delivered in lots of one hundred barrels, each lot to be paid for on delivery, which was to be made at the defendant's depot in Milwaukee. In pursuance of this contract, the plaintiff sent one hundred bar-

rels to the depot, and the defendant's shipping clerk ascertained from the teamster who hauled the first load that it was "for Tilton." He knew, however, that it was brought from the plaintiff's mill. On the same day Tilton procured from the company a bill of lading for the one hundred barrels, and shipped them to Chicago; and the defendant afterwards gave the plaintiff a receipt for the flour, which stated that it was received "for shipment." Subsequently the plaintiff, by Tilton's order, delivered at the depot the two remaining lots of one hundred barrels each called for by the contract, and received from Tilton for each lot \$825 upon delivering to him the railroad receipt. The fifty dollars in excess of the contract price was by Tilton's direction and the plaintiff's consent to be applied on his indebtedness to the plaintiff; but the evidence was conflicting as to whether it was to be applied upon his account generally, or specially as a payment on the flour in controversy. Verdict was rendered for the plaintiff for the full value of the flour, and interest; and a motion for a new trial, on the ground of errors in the rulings and instructions of the court, and that the verdict was contrary to the evidence, being overruled, and judgment being entered on the verdict, defendant appealed.

Brown and Pratt, for the appellant.

Byron Paine, for the respondent.

By Court, DIXON, C. J. Mr. Watson, the receiving and shipping clerk of the defendant, the railway company, knew that the flour belonged to the plaintiff. He knew it because he knew it came from the plaintiff's mill, and that the teamster who hauled it was the same who had previously hauled flour for the plaintiff. He himself testified to these facts. He also testified that his only authority for delivering the bill of lading to Mr. Tilton was, that the teamster "said that the flour was for Mr. Tilton." This was clearly no authority for delivering the flour to Mr. Tilton; and such delivery was a conversion by the railway company.

In the first place, the teamster was not the agent of the plaintiff for any such purpose. He was a mere servant, having possession of the flour for the purpose of delivering it to the railway company, and nothing more. He had no power or semblance of power, by virtue of his employment, to direct the delivery of the flour by the railway company to Mr. Til-

ton or any one else. The agents and servants of the railway company were bound to know this, and to govern themselves accordingly: See authorities cited by counsel for plaintiff to this point. Special authority from the plaintiff to the teamster for that purpose was not shown, nor attempted to be.

In the second place, the statement of the teamster that the flour was for Mr. Tilton did not justify the inference either that it then belonged to Mr. Tilton, or that he was entitled to the possession of it. It was no more than saying that it was intended for him, which was true, but which could not have been understood as implying that it was to be delivered by the railroad company to him without further and specific instructions to that effect from the plaintiff, who was the real owner.

Upon these facts alone, which are clear and undisputed, I do not see how the jury could have found otherwise than that the delivery to Mr. Tilton was wholly unauthorized; and that without regard to any evidence of the supposed custom prevailing among business men in transactions of this nature. If there was no custom, and no evidence tending to establish it, the verdict must have been the very same. I do not, therefore, consider it necessary to examine any of the exceptions or alleged errors arising out of that part of the case. They become immaterial, and cannot affect the judgment.

The next question, and that about which we have had most difficulty, arises out of the subsequent delivery by the plaintiff to Mr. Tilton of the other two hundred barrels of flour mentioned in the agreement. He delivered and received pay for them. Was such delivery and receipt of payment a waiver of the condition of payment down for the first hundred barrels according to the agreement? Did the plaintiff thereby ratify the entire agreement so that he could not afterwards rescind as to the one hundred barrels of which Mr. Tilton had thus obtained wrongful possession? Laying aside all questions under the statute of frauds, and considering the agreement in every respect as valid as if it had been reduced to writing and subscribed by the parties, I yet think that the plaintiff waived none of his legal rights arising out of the wrongful delivery or taking of the first one hundred barrels. I think so because I think the agreement was divisible. It was for the sale of three hundred barrels of flour at eight dollars per barrel, to be delivered in lots of one hundred barrels each, each lot to be paid for on delivery. It was in legal effect

the same as if there had been three contracts for the sale and delivery of one hundred barrels of flour each. The delivery of the flour and receipt of the price under one contract was not a waiver of any rights which had accrued in consequence of the non-performance of another. "Any contract," says Mr. Parsons, "may consist of many parts; and these may be considered as parts of one whole, or as so many distinct contracts, entered into at one time, and expressed in the same instrument, but not thereby made one contract. . . . If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such contract will generally be held to be severable": See 2 Parsons on Contracts, 5th ed., 517, and cases cited in note b, especially *Johnson v. Johnson*, 3 Bos. & P. 162, and *Robinson v. Green*, 3 Met. 159. See also *Goodwin v. Merrill*, 13 Wis. 659.

The only remaining question necessary to be considered is as to the eighth instruction given by the court to the jury. That instruction was to the effect that the subsequent receipt by the plaintiff from Mr. Tilton of fifty dollars on account of the flour wrongfully delivered, if the jury should so find, would constitute no release or waiver of the plaintiff's right of action against the defendant. The correctness of this instruction is very questionable; but whether it is correct or not is not a matter which need now be considered. It has become speculative and immaterial by the finding of the jury. The jury returned a verdict for the plaintiff for the value or price of the flour, with interest from the time of conversion, and thus must have found that the fifty dollars was received by the plaintiff, not in part payment for this flour, but upon a pre-existing debt due from Tilton to him. The verdict in this respect is sustained by evidence, and was found under a proper instruction given by the court upon that point. Hence the defendant is not aggrieved by the instruction, conceding it to have been erroneous, and the judgment will not on that account be reversed: *Lawler v. Earle*, 5 Allen, 22; *Powers v. Sawyer*, 46 Me. 160; *Johnston v. Jones*, 1 Black, 209, 222; *Ramsey v. Gloss*, 9 Gill, 56.

Judgment affirmed.

PRINCIPAL, WHEN BOUND BY ACTS AND DECLARATIONS OF HIS AGENT. See *Westfield Bank v. Cornen*, 93 Am. Dec. 573, and note 577; *Burnside v. Grand Trunk R'y Co.*, 93 Id. 474; *Dutcher v. Beckwith*, 92 Id. 232. The prin-

cial case is cited to the point that a common carrier is not bound by its agent's knowledge or notice of facts outside of his duties and employment as such agent: *Wells v. American Express Co.*, 44 Wis. 349.

SEVERABLE CONTRACTS, WHAT ARE: See *Leonard v. Dyer*, 68 Am. Dec. 382, and note 385; *Superintendent v. Bennett*, 72 Id. 373, and note 378; *Derickson v. Edwards*, 80 Id. 220.

ERRONEOUS INSTRUCTIONS NOT PREJUDICIAL ARE NOT GROUND FOR REVERSAL: *Hovey v. Chase*, 83 Am. Dec. 514, and note 523; *Hanlon v. Keokuk*, 74 Id. 276; *Pemroy v. Parmlee*, 74 Id. 328; *Saltonstall v. Riley*, 65 Id. 234, and note 341; *Western Stage Co. v. Walker*, 65 Id. 789, and note 798.

BLAKE v. COLEMAN.

[22 WISCONSIN, 415.]

INDORSEMENT ON INSTRUMENT IN FORM OF PROMISSORY NOTE that the payee or bearer was "not to expect payment" until certain property of the maker was "sold for a fair price," if made at the time the note was signed, makes it a mere conditional agreement, and an action cannot be sustained thereon without showing a fulfillment of the condition.

PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT CONDITION INDORSED ON NOTE was on the note when it was signed.

LEGAL EFFECT OF INDORSEMENT ON NOTE THAT PAYEE OR BEARER is "not to expect" payment until certain property of the maker is "sold for a fair price" is, it seems, that the maker is to sell the property; and parol evidence would be incompetent to show that it was agreed that the payee was to sell it.

ACTION on an instrument which was, on its face, a promissory note in the usual form, with the defendant as maker and the plaintiff as payee; but it was indorsed without date or signature as follows: "The conditions of the within note are as follows: L. S. Blake or bearer is not to ask or expect payment of said note until his, Coleman's, old mill is sold for a fair price." The complaint was on a promissory note, and the answer a general denial. The defendant objected to the admission of the instrument in evidence, but his objection was overruled. He testified that the indorsement was made before the note was signed; that it was given for a fanning-mill bought by him from the plaintiff, and that he had an old fanning-mill at the time he made the note. He offered to show by parol that it was agreed that the plaintiff should dispose of the old mill, but that it had not been disposed of, and the plaintiff had never offered to dispose of it. This evidence, however, was excluded on the ground that it tended to vary the terms of a written instrument. Judgment for the plaintiff, and appeal by the defendant.

A. B. Hamilton, for the appellant.

William Bugh, for the respondent.

By Court, PAINE, J. The court below erred in holding that the instrument on which the action was brought was not affected by the indorsement on the back, but was admissible as a mere promissory note. It may be shown by parol that the indorsement was on the note at the time it was signed. And that being so, it became part of it, and turned it into a mere agreement: *Chitty on Bills*, 8th ed., 160, 161; *Leeds v. Lancashire*, 2 Camp. 205; *Hartly v. Wilkinson*, 4 Id. 127; *Cook v. Kelsey*, 19 N. Y. 415. As this condition qualified the note, the action could not be sustained without showing that it had been fulfilled. We are inclined to think the legal effect of the indorsement is, that the owner of the old fanning-mill was to sell it; and that parol evidence would be incompetent to show that it was agreed that the plaintiff should sell it. But, for the reason above stated, the judgment must be reversed, and cause remanded for a new trial.

Ordered accordingly.

PROMISSORY NOTE PAYABLE CONDITIONALLY IS NOT NEGOTIABLE: *Read v. McNulty*, 78 Am. Dec. 467, and note 468; *Lowe v. Bliss*, 76 Id. 742; *Acceitt's Adm'r v. Booker*, 76 Id. 203, and note 209; *Hopson v. Brunsankel*, 76 Id. 124; *Hubbard v. Mosely*, 71 Id. 698, and note 699. But where a note is given to an insurance company for the premium upon a policy of insurance, its negotiable character is not affected by a further agreement therein that if it shall not be paid at maturity the whole amount of premium on the policy shall be considered as earned, and the policy shall be void while the note remains overdue and unpaid: *Kirk v. Dodge County Mut. Ins. Co.*, 39 Wis. 141, distinguishing the principal case. In *Morgan v. Edwards*, 53 Id. 608, it is held that a condition to pay all expenses of collection, such expenses being of an uncertain amount, will destroy the negotiability of a promissory note; and the principal case is cited, though not relied upon, by the court as a precedent binding to this extent.

PAROL EVIDENCE IS NOT ADMISSIBLE TO VARY NOTE: *Weaver v. Lapley*, 94 Am. Dec. 671, and note 677.

STARR v. LIGHT.

[22 WISCONSIN, 433.]

CONTRACT TO PAY PURCHASE PRICE OF LAND IN WHEAT OF CERTAIN QUALITY, at a specified price per bushel, in annual installments of a specified amount, is equivalent to a contract for the sale of the amounts of wheat to be delivered at the times and price specified; the vendor is entitled to the wheat, or in default thereof, he may recover its actual value at the times specified for its delivery; and the vendee has no right to pay in money, instead of wheat, the amount of the purchase price. And more especially will this rule apply where the contract signifies the intention of the parties that the mode of payment shall not be at the option of the debtor, as where it provides that he may pay more in each year, provided that the additional payments shall be made in wheat at the stipulated price, or in cash, as the vendor may elect.

ACTION upon an agreement to pay the purchase price of land. Judgment for the plaintiff for the whole amount claimed, and appeal by the defendant. The opinion states the case.

E. L. Runals, for the appellant.

A. B. Hamilton, for the respondent.

By Court, PAINE, J. The question presented in this case is one of considerable interest, and has never been decided by this court.

The decisions of other courts are conflicting upon the subject; and it becomes our duty to determine which seems to us to have the better reason.

The plaintiff gave a land contract, by which he sold and agreed to convey the land described on compliance by the purchaser with the conditions to be performed on his part.

The provision in regard to payment was as follows: "And the said party of the second part, for himself, his heirs, executors, administrators, and assigns, does covenant and engage to and with the said party of the first part, his heirs, executors, administrators, and assigns, to pay the said party of the first part, his heirs and assigns, the just and full sum of two thousand four hundred dollars, with interest at ten per cent per annum (payable annually) till paid, in manner following, viz.: The whole amount, principal and interest, to be paid in good, clean, dry, merchantable wheat, equal to the best qualities of Club and Rio Grande produced on similar land the past year; the price to be seventy-five cents per bushel, and the wheat to be delivered at such place in the city of Ripon

aforesaid as the said party of the first part may from time to time require; the wheat to be delivered at times and in amounts as follows, viz.: Four hundred bushels on the tenth day of September, 1862, and six hundred (600) bushels annually on the tenth day of September thereafter, until the whole amount of principal and interest is paid," etc.

Wheat became worth a much larger sum than seventy-five cents per bushel; and the defendant, who is the assignee of the contract, claims the right to pay in money enough to make up the two thousand four hundred dollars, with interest. The plaintiff claims that he is entitled to the wheat, or to the value of the several amounts provided for at the time when they ought to have been delivered; and there are cases sustaining both positions. Those that support the defendant adopt the theory that provisions like these, in regard to the mode of payment, are inserted only for the benefit of the debtor, and that they give him the privilege to pay either in money or in the articles specified, as he may elect.

I shall not attempt an elaborate review of these cases, but shall simply state the objections which have led us to reject their reasoning, and to adopt that of the opposite decisions.

In the first place, they take an undue liberty with the language of contracts, and insert in them provisions which the parties have not made. When the contract expressly provides that payment shall be made in a specific article at a specified price, they say it need not be so made. They say that such a provision was for the benefit solely of the debtor, when the contract says no such thing, and when that mode of payment may have been the very reason that induced the creditor to make it. They say that because such contracts specify a certain number of dollars as the consideration, that shows that the creditor was willing to sell his property for that amount in money, when perhaps the sum was only fixed in view of the other provision for payment in a specific article, at a specified price. There is no mutuality in the rule they establish. Thus if the value of the article in which payment is to be made falls below the specified price, they all hold that the debtor may still pay in that article at that price. But if the value rises above that price, then he may pay in money. The creditor is to lose by the fall of articles he contracts for, but not to gain by the rise. Such a rule seems intrinsically unjust. For these reasons, even though there was nothing in this contract which distinguished it from many and probably

from all those cases, we should still hold that such a contract was equivalent in all respects to a contract for the purchase of the amounts of wheat to be delivered at the times and price specified. That conclusion is sustained by the following cases: *Meason v. Philips*, Addis. 346; *Edgar v. Boies*, 11 Serg. & R. 445; *Price v. Justrobe*, Harp. 111; *Wilson v. George*, 10 N. H. 445, 449; *Mattox v. Craig*, 2 Bibb, 584; *Cole v. Ross*, 9 B. Mon. 393 [50 Am. Dec. 517].

We do not rely upon that class of cases relating to notes or contracts to pay specified sums in stock or depreciated currency, because in them the stock or currency is properly described by the denomination of dollars.

But there are some provisions that distinguish this contract from any in the cases relied on by the appellant. It is distinguished from some of them in the fact that the amounts of wheat to be delivered are specified. This, however, is not very significant. But there is a provision following that above quoted which seems to us very important as showing beyond any question that it was not the intention of these parties that the mode of payment provided should be at the option of the debtor. And if that appears, then, according to all these cases, the intention must govern. After specifying the amount of wheat to be delivered at each installment, the contract proceeds: "With the privilege to the said party of the second part of paying more in each year, provided that said additional payments shall, at the option entirely of said party of the first part, be made in wheat at the above stipulated price, or in cash, as the said first party shall elect." This shows clearly that the vendor intended to secure, and the purchaser to give, the right to the wheat absolutely. They evidently understood that the positive provisions of the contract for that mode of payment, specifying the time and amounts, would secure that result. But when the vendor gave the debtor the privilege of paying more at any of those times, it was feared that such excess, if he should elect to pay more, might not be so plainly provided for. So, to remove all doubt, the option is expressly reserved to the vendor of the land to receive the excess in wheat at the stipulated price, or in money, as he might elect. In view of that provision, which distinguishes the contract from any in the cases cited, there is no room to maintain that the parties intended the mode of payment provided in the contract to be at the option of the debtor.

The judgment is affirmed, with costs.

WHERE DEBTOR AGREES TO PAY BY SAWING INTO LUMBER timber which the creditor is to furnish, and the latter dies before furnishing it, the debtor cannot be compelled to pay in money, nor is there any breach of contract on his part until the timber has been furnished to him, and he refuses to saw it; *Hawkins v. Ball's Adm'r*, 65 Am. Dec. 755. In *Wheeler v. Hartshorn*, 40 Wis. 102, it is held that legacies of a number of dollars in bonds or notes and mortgage securities are general, and not specific, legacies, and are payable in the full amount of money named, it being immaterial whether they are paid in money or in bonds and notes; distinguishing the principal case, and *Noonan v. Holey*, 17 Wis. 314, on the ground that the testator had not directed in what specific notes or bonds each legacy should be paid.

LEMON v. GROSSKOPF.

[23 WISCONSIN, 447.]

PROPRIETOR OF LOTTERY WHO EMPLOYS PERSON TO SELL TICKETS, AND RECEIVE PROCEEDS, cannot recover the proceeds from him, the sale of lottery tickets being criminal by statute; for the obligation to pay over the money received for tickets is so connected with the illegal contract to sell them as to be inseparable from it, and a court will not lend its aid to enforce it.

PROCEEDS OF SALE OF LOTTERY TICKETS PAID BY AGENT FOR SALE THEREOF to another agent for their sale, with directions to pay them over to the proprietor of the lottery, may be recovered by the latter from the second agent, for his obligation to pay over this money is disconnected from his illegal contract to sell tickets.

MONEY PAID TO THIRD PERSON FOR USE OF PLAINTIFF may be recovered from such person, though the money is the proceeds of an illegal transaction.

ACTION on a promissory note. The plaintiff was a member of the firm of Briggs, Lemon, & Co., who were the proprietors of a lottery scheme in Chicago, Illinois, called a gift concert. The firm placed in the hands of the defendant a number of tickets, to be sold by him as their agent; and it was agreed that he should retain the money received for the tickets until he became satisfied that the drawing of the lottery was to be fairly conducted. One Kilgore was also employed by the firm to sell tickets, and he was to pay over the money received before the drawing. The defendant sold 258 tickets at one dollar apiece, and retained nineteen tickets himself as a purchaser. Before the drawing, the plaintiff became the sole owner of the scheme. The defendant directed Kilgore before the drawing to pay him all the money received for tickets, to be transmitted to the plaintiff; and Kilgore delivered to him \$255, received for tickets. Of this money, ninety-five dollars were delivered without any conditions or instructions, other than that it was money

for the plaintiff obtained from the sale of lottery tickets in Wisconsin; but when he delivered the balance, he told the defendant to retain it until satisfied that "the show was all right," though he had no authority from the plaintiff to attach any conditions to the defendant's transmission of the money. The defendant went to Chicago just before the drawing took place, and being satisfied that it was to be fairly conducted, accounted with the plaintiff for all the money he had received from the sale of tickets, and from Kilgore, and for the nineteen tickets which he had retained for himself, and drew a check upon a bank in Milwaukee, in favor of the plaintiff, for the full amount. This check, however, was not paid, and the defendant afterwards gave plaintiff his note for the amount, and took up the check, and upon the note this action is brought. Judgment for the defendant, and appeal by the plaintiff.

Paine & Co., for the appellant.

Stark and McMullen, for the respondent.

By Court, COLE, J. The counsel on both sides substantially concede that the rule is well settled that courts will not enforce illegal contracts; but they differ as to the application of that rule to the facts of this case. So far as the nineteen tickets which the defendant retained for himself are concerned, it is admitted by the plaintiff's counsel that no recovery can be had. Then the question arises, Was the plaintiff entitled to recover the money received by the defendant for tickets sold by himself? It is insisted that he can recover that money because the illegal contract has been fully executed, the purchasers of the tickets having paid over the same to the defendant for the use of the plaintiff. It is said that when money is paid by one person, on an illegal contract, to the agent of the party entitled to receive it, such agent cannot set up the illegality as an answer to the claim of the principal; that, as between the agent and the principal, the action is not founded on the illegal contract, nor does the obligation of the agent to pay over the money grow out of such contract, but arises from the fact that the agent has received money for the principal. This may be true in some cases, and seems to be the ground upon which *Tenant v. Elliott*, 2 Bos. & P. 4, *Farmer v. Russell*, 2 Id. 296, *Sharp v. Taylor*, 2 Phill. Ch. 801, *Owen v. Davis*, 1 Bail. 315, and some other cases to which we were referred on the argument, are decided. It seems to us, however, that the

doctrine of these cases is not entirely applicable to the case before us. The difference may not be very discernible, but still we are disposed to give it weight in our decision. Here the defendant was employed by the plaintiff to sell these lottery tickets, receive and retain the money for them until he became satisfied that the drawing of the prizes in the scheme was fairly conducted, and then account to the plaintiff. It was as well a part of his agency to receive and account for the money as to sell the tickets. And an action to recover this money goes in affirmance of the illegal contract and to enforce the performance of this duty. The main object of the agency was to do an act criminal by our statute (R. S., sec. 2, c. 169),—to engage “in a traffic not merely forbidden, but fraudulent and indictable.” And if the agent is dishonest in the transaction of the business,—if he refuses to account for money which he has secured for the tickets sold by him,—should the court interfere and enforce a performance of his duty? It seems to us that the court must decline to interfere on either side, upon the maxim, *Ex turpi causa non oritur actio*. In *Hunt v. Knickerbocker*, 5 Johns. 326, which was an action on a contract made for the sale of tickets in a lottery not authorized by the legislature of New York, Mr. Justice Thompson, in delivering the opinion of the court, said: “No case could be found where an action has been sustained which goes in affirmance of an illegal contract, and where the object of it is to enforce the performance of an engagement prohibited by law. Wherever an action has been sustained against a party to prevent him from retaining the benefit derived from an unlawful act, the action proceeds in disaffirmance of the contract; and instead of endeavoring to enforce it, presumes it void”: See *Thalimer v. Brinkerhoff*, 20 Johns. 386–397; *Armstrong v. Toler*, 11 Wheat. 258. It seems to us that the obligation of the defendant to pay over the money which he has received for the tickets sold by him is so connected with the illegal contract as to be inseparable from it, and that a court should not lend its aid to enforce it: *Murdock v. Kilbourn*, 6 Wis. 468.

But the money which the defendant received from Kilgore stands upon different grounds. So far as that money was concerned, it seems to us that it stands precisely on the same ground it would had Kilgore delivered the money to some stranger, or to an express company, to transmit it to the plaintiff. It is disconnected with the illegal transaction, and is not affected by it. It is the case suggested by the master of the

rolls in *Thomson v. Thomson*, 7 Ves. 468-471, of money paid into the hands of a third person for the use of the plaintiff, who may recover the same from such third person, although the money is the proceeds of some illegal transaction: *Merritt v. Millard*, 5 Bosw. 645. Therefore, so far as respects the \$255 paid the defendant by Kilgore for the plaintiff, the action is maintainable.

The judgment of the county court must be reversed, and the cause remanded, with directions to enter judgment for the plaintiff for that amount.

Ordered accordingly

PAINE, J., having been of counsel for the plaintiff, did not sit in this case.

DEFENSE AGAINST RECOVERY OF MONEY COLLECTED ON GROUND THAT IT WAS COLLECTED ON UNLAWFUL CONTRACT OR FOR ILLEGAL PURPOSE.—The general rule with respect to the enforcement of illegal or immoral contracts, or contracts against public policy, is contained within the ancient maxims: *Ex turpi causa*, or *Ex dolo malo, non oritur actio*, and *In pari delicto potior est conditio defendentis et possidentis*. See also note to *Boyd v. Barclay*, 34 Am. Dec. 765-767, on the rights of parties to illegal or fraudulent transactions. When a plaintiff comes into court, and in order to establish his case, finds it necessary to rely upon such a contract as the gist of his action and the foundation of his recovery, he proves himself out of court, for no court will lend its aid to enforce a contract which is illegal, or variant from the dictates of public policy, but will leave the parties where it finds them. And the defendant may also make use of this malady in the plaintiff's action, and if he is a party to the contract and equally affected by its illegal provisions, he may set this up as a defense against the plaintiff's recovery. Nor is he thereby enabled to take advantage of his own wrong, for both he and the plaintiff must be equally in the wrong, and *in pari delicto potior est conditio defendentis*; and therefore it is rather of the plaintiff's than his own wrong that he takes advantage. Furthermore, as the illustrious Lord Mansfield has said: "The objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *Ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it, for where both are equally in fault, *potior est conditio defendentis*": *Holman v. Johnson*, 1 Cowp. 343.

This, however, is the limit of the doctrine. And the plaintiff and defendant may have been guilty of any number of illegal acts, and yet the plaintiff may recover so long as those acts do not vitiate the contract upon which he sues; and notwithstanding the whole history of that contract would, and sometimes does, disclose illegal acts and contracts, it constitutes a perfectly competent cause of action, provided it can stand alone upon a new and separate consideration, and is in itself a lawful contract. Where a contract grows immediately out of and is connected with an illegal or immoral act, a court of justice will not lend its aid to enforce it. So if the contract be in part only connected with the illegal consideration, though it be in fact a new contract, it is equally tainted by it. But if the promise be entirely disconnected from the illegal act, and is founded on a new consideration, it is not affected by the act, although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act: *Armstrong v. Toler*, 11 Wheat. 258; *Buck v. Abbe*, 26 Vt. 184; S. C., 62 Am. Dec. 564; *Phalen v. Clark*, 19 Conn. 421; S. C., 50 Am. Dec. 253; *Thalimer v. Brinckerhoff*, 20 Johns. 386-397; *Green v. Corrigan*, 87 Mo. 370; *Hinnen v. Newman*, 35 Kan. 709; *Daniels v. Barney*, 22 Ind. 207. Therefore the test is, whether or not the contract sought to be enforced can be separated from the illegal acts or contracts relied upon as avoiding it, and whether or not the plaintiff requires any aid from or must in any way rely upon the illegal transaction in order to establish his case: *Hardy v. Stonebraker*, 31 Wis. 647; *Buck v. Abbe*, 26 Vt. 184; S. C., 62 Am. Dec. 564; *Green v. Corrigan*, 87 Mo. 370; *Thalimer v. Brinckerhoff*, 20 Johns. 386-397; *Farmer v. Russell*, 1 Bos. & P. 296; *Simpson v. Bloss*, 7 Taunt. 246. In *Farmer v. Russell*, *supra*, Chief Justice Eyre said: "The plaintiff's claim arises simply out of the circumstance of money being put into the defendant's hands, to be delivered to the plaintiff. This creates an *indebitatus*, from which an *assumpsit* in law arises, and on that an action on the case may be maintained. The case is brought to this: That the money has got into the hands of a person who was not a party to the contract, who has no pretense to retain it, and to whom the law could not give it by rescinding the contract." And Bullis, J., said in the same case: "When it appeared that the agent had received the money to the plaintiff's use, it was immaterial whether the money was paid on a legal or illegal contract." And in *Woodworth v. Bennett*, 43 N. Y. 275, 276, Chief Justice Church says: "It is undoubtedly true that if the contract or obligation does not depend upon nor require the enforcement of the unexecuted provisions of the illegal contract, it will be carried out. It has been laid down as a test that whether a demand connected with an illegal transaction is capable of being enforced at law depends upon whether the party requires any aid from the illegal transaction to establish the case: Chitty on Contracts, 657. So it has been settled that when a party pays money to a third person for the use of another, which, on account of the illegality of the transaction, he was not obliged to pay, such third person cannot interpose the defense of illegality: *Tenant v. Elliott*, 1 Bos. & P. 3; *Merritt v. Millard*, 4 Keyes, 208. This principle is based upon the undoubted right of a person to waive the illegality and pay the money; and that when once paid, either to the other party directly, or to a third person for his use, it cannot be recalled; and that the third person, who was in no way connected with the original transaction, cannot avail himself of a defense which his principal saw fit to waive."

Third Person.—Therefore when one party to an illegal contract pays money in execution and satisfaction of it to a third person for the use of the

other party to the contract, upon a promise by the third person to pay it over to the other party, he cannot defend an action for the money on the ground of the illegality of the contract in satisfaction of which it was paid; for, as he in no way participated in the illegal contract, and as his obligation to pay over the money is a new and different contract, the plaintiff need not rely upon the illegal contract to establish his case, but sues upon the new contract to pay over the money. This latter contract the court will enforce, and will not allow the defendant to retain the money because of the illegal contract in which he had no privity: *Merritt v. Millard*, 5 Bosw. 645; S. C., 4 Keyes, 208; *Tenant v. Elliott*, 1 Bos. & P. 3; *Farmer v. Russell*, 1 Id. 296; see *Thomson v. Thomson*, 7 Ves. 468; and the principal case. Thus where one agreed to pay another five hundred dollars if he would not bid against him at an auction sale, and gave the money to a third person to take to him, the latter might recover from the third person upon his refusal to pay over the money: *Merritt v. Millard*, 4 Keyes, 208, citing *Hamilton v. Canfield*, 2 Hall, 526; *Woodworth v. Bennett*, 43 N. Y. 273, 276.

Insurance Broker. — In *Tenant v. Elliott*, 1 Bos. & P. 3, which is the leading case in which this distinction is taken between the illegal contract and the *assumpsit* of the third person to pay over the money, a broker who effected a policy on goods bound for the East Indies afterwards received from the underwriters the amount of the policy, the goods having been lost. The laws of England provided that all contracts with reference to supplying cargoes to any ship bound to the East Indies should be void, and the courts had held that insurance policies on such cargoes were void. The broker was, however, held to be liable for the amount received by him.

Agents. — So, in general, money collected by an agent, or paid to him for his principal, on an illegal contract in which he had no participation, may be recovered: See *Hovey v. Storer*, 63 Me. 486; *Daniels v. Barney*, 22 Ind. 207; the principal case. Thus where two steamship companies agree that one shall not oppose the other, the latter agreeing to pay the former a certain sum per trip, and does pay such sum to the former's agent, the agent cannot defend a suit for the recovery of the money on the ground of the invalidity of the contract between the companies: *Murray v. Vanderbilt*, 39 Barb. 140. So a carrier who takes a package of counterfeit money to deliver C. O. D. is liable to account to the consignor for the money collected from the consignee, if he was not informed of its contents by the consignor: *Farmer v. Russell*, 1 Bos. & P. 296. An agent who collects usurious interest for his principal is liable to the principal therefor: *Chinn v. Chinn*, 22 La. Ann. 599. And so where A sues B, who is the agent of C, for money had and received by him to A's use, B having received the insurance money on a policy on goods sold or conveyed by C to A in fraud of C's creditors, B cannot set up this fraud in defense; for the conveyance, as between the parties, is good, and B is a mere agent: *Newson v. Douglass*, 7 Har. & J. 417; see also *Owen v. Dixon*, 17 Conn. 492.

Promissory Note. — Where A gives B, for his children, a note, to secure them against his creditors, and F receives the note for collection and delivers the proceeds to G, who pretends to have authority to receive them, G cannot plead the illegality of the note, in an action for money had and received: *Fairbanks v. Blakinton*, 9 Pick. 93. And in *Owen v. Davis*, 1 Bail. 315, the plaintiff and defendant were joint winners at cards of a sum of money for which the loser gave his note to the defendant; the latter transferred the note, in payment of a gaming debt of his own, to a third person, who subsequently

received payment from the maker, and it was held that the plaintiff was entitled to recover his share of the sum paid by the maker of the note.

Treasurer of Horse-fair Association was held to be liable to the association in an action for moneys had and received, though the purposes of the association were illegal, the money being received as stock subscriptions, entrance and admission fees, and commissions on pools sold. It does not appear, however, that the defendant in his capacity of treasurer participated in any of the illegal acts: *Willson v. Owen*, 30 Mich. 474.

Wharfinger. — So in *Betteley v. Reed*, 4 Q. B. 511, the defendant, a wharfinger, received malt from and for B, and B, to cover a usurious transaction, made a colorable sale of the malt to plaintiff, the defendant transferring the malt on his books to the plaintiff. Afterwards B became bankrupt, and his assignees sued the plaintiff in trover for the malt. Pending the dispute, plaintiff, defendant, and the assignees agreed that the malt should be sold, and the proceeds paid into a bank, except a part which the defendant was to retain on account of a lien which he had against B, but that this transaction should not prejudice the rights of any party. The defendant had no lien against the plaintiff. Afterwards the assignees abandoned the action against the plaintiff, on his giving up part of the proceeds, and the plaintiff then brought *assumpsit* against the defendant for money had and received, and it was held that he might maintain the action, and that the defendant could not set up the usurious nature of the transaction between B and the plaintiff as invalidating the transfer.

Agent, to Sell Property, cannot defend an action for the proceeds on the ground that his principal obtained the property illegally. As we shall see, the principal cannot recover when the agent participates in the illegal act, for both are then *in pari delicto*. But the mere selling of property illegally obtained is not a participation in the illegal act of obtaining it. Thus where a contract for the sale and purchase of property has been executed by the delivery of the property to the purchaser, the latter becomes vested with the title to it, at least so far as persons receiving the same from him to sell on commission are concerned. And whether the property was originally obtained by the vendor under an illegal contract or not, does not affect the question of the liability of the consignees to account to the consignor for the moneys received by them upon the sale of the property. The undertaking of the consignees to sell the property for the consignor on commission is upon a new and distinct consideration, having no actual or necessary connection with the original contract. And the consignees are in no wise privy to that contract, nor in a position to question the title of the consignors to the property: *Alford v. Latham*, 31 Barb. 294. But see *Hardman v. Willcock*, 9 Bing. 382, note a (auctioneer), *contra*, but not authority. One who has sold a horse for another cannot defend an action for the proceeds, on the ground that the principal won the horse at a raffle: *Jamieson v. Sherwood*, 14 U. C. Q. B. 282. And so an agent who has sold stock in a corporation, chartered contrary to law, cannot set up that fact in an action against him for the proceeds: *Bonsfield v. Wilson*, 16 Mees. & W. 185.

An agent for the sale of slaves was liable for the money received, though the slaves were illegally imported: *Andersons v. Moncrieff*, 3 Deaua. Eq. 124. And in *Baldwin v. Porter*, 46 Vt. 402, it was held that an agent is bound to account to his principal for money received by him in the course of his agency, for goods sold by his principal on orders obtained by him as agent on commission, although the sales, as between the principal and purchaser, be illegal and void. But this case, if authority, is certainly upon the verge; for it is

difficult to see how the act of the agent in obtaining the orders is not inseparably connected with the illegal contract of sale.

Illegal Restrictions upon Agent, No Defense.—The fact that restrictions imposed upon agents for the sale of goods are in restraint of trade will not give the agent the right to retain money in his hands, which he has collected as the agent of the owner of the goods, and which belongs to the latter: *Alford v. Latham*, 31 Barb. 294.

Surety.—If the principal in a bond given for an illegal consideration deliver the money due upon it to his surety, to be paid to the payee, and he agrees to pay it over, this is a new contract and undertaking on his part, and though a party to the original contract, he is as much bound to pay the money as a stranger to the illegal contract would have been: *Barker v. Parker*, 23 Ark. 39.

Municipal Officers.—A town treasurer who receives the proceeds of taxes raised under an illegal vote cannot retain the money, but must pay it over to the town: *Holderness v. Baker*, 44 N. H. 414; *Johnson v. Goodridge*, 15 Me. 29 (tax-collector); *Evans v. City of Trenton*, 24 N. J. L. 764, 773; see *State v. Phares*, 24 W. Va. 657; *Mayor v. Draper*, 23 Barb. 425.

MONEY COLLECTED CANNOT BE RECOVERED WHERE PERSON COLLECTING IT WAS PRIVY to or participated in the illegal contract, or where the contract of agency subsisting between the plaintiff and defendant is an illegal or immoral one, for in this case the cause of action cannot be made out without the aid of an illegal contract; and the parties being *in pari delicto*, the court will not lend its aid to either: *Daniels v. Barney*, 22 Ind. 207, 213; *Root v. Stevenson*, 24 Id. 115; *Comstock v. Draper*, 1 Mich. 481; S. C., 53 Am. Dec. 78; *Howell v. Fountain*, 3 Ga. 176; S. C., 46 Am. Dec. 415; *Thalmer v. Brinckerhoff*, 20 Johns. 386-397; *Fales v. Mayberry*, 2 Gall. 563, 564; *Mabin v. Coulon*, 4 Dall. 298. "The sentiment of 'honor among thieves' cannot be enforced in courts of justice": *Per Church*, C. J., in *Woodworth v. Bennett*, 43 N. Y. 277. And an agent "may insist, as a matter of defense, that the subject-matter of the agency is an illegal or an immoral transaction, or is founded in fraud, or against public policy; in all which cases the principal will not be allowed to maintain any suit for redress of any sort against the agent touching that transaction": *Story on Agency*, sec. 235.

Partnership—Slaves.—Thus where a joint agreement or contract of partnership is illegal, and money is paid to one of the associates upon an illegal contract, a fellow-associate cannot recover his share of the money, because, in order to do so, he must rely upon the illegal contract of partnership: *Woodworth v. Bennett*, 43 N. Y. 273. Therefore no action can be maintained against a master and part owner of a ship engaged in the slave trade, by his partners in the joint concern; nor against an agent, who is party to the original illegal traffic, and has the proceeds in his hands. And if the ship be sold in a foreign port to evade a forfeiture incurred to the United States, no action will lie for the proceeds: *Fales v. Mayberry*, 2 Gall. 560; see *Maybin v. Coulon*, 4 Dall. 298. A and B entered into a partnership with C, who was an assistant-quartermaster of the United States, by which they were to furnish forage for the use of the army, which was to be purchased of the firm, and inspected and received by C, as such quartermaster. At a settlement of the business, B, in whose hands all the profits were, paid over to C A's share, to be delivered by him to A. A sued C for the money, alleging a conversion, and it was held that the contract, being against public policy, was void, and that A could not maintain his action: *Root v. Stevenson*, 24 Ind. 115. So where the attorney of a water-works company, and a member of its local

board, having power to make contracts, agreed with a contractor, without the knowledge of the company, to share with him the profits of a contract, he could not recover from the contractor: *Green v. Corriyan*, 87 Mo. 359. But if the partnership is not in itself illegal, and a partnership contract confessedly against public policy has been carried out, and money contributed by one of the partners has passed into other forms, and become the "results" of the completed operation, a partner, in whose hands the profits are, cannot refuse to account for and divide them on the ground of the illegal character of the original contract: *Brooks v. Martin*, 2 Wall. 70. A person who sells slaves for another, contrary to law, cannot be compelled to account: *Wooten v. Miller*, 7 Smedes & M. 380.

Smuggled Goods. — So the proceeds of goods put into the hands of an agent, to be smuggled and sold, are not recoverable from the agent: *Edgar v. Fowler*, 3 East, 222; *Story on Agency*, sec. 235.

Contracts with Alien Enemies. — Where A employed B to buy up cotton for him in the South, and gave him money to buy it, A being a unionist and B a confederate, A could not maintain a bill against B for an accounting: *Overby v. Overby*, 21 La. Ann. 493; *Juillard v. Roguy*, 21 Id. 259; *Cousin v. Abat*, 21 Id. 705; *Campbell v. Anderson*, 2 Dav. 384; *contra*, *Gilliam v. Brown*, 43 Miss. 642 (refusal to pay over money obtained from trading with alien enemies). And so where a master of a ship was given a cargo to dispose of in South America, and his vessel was sailing with a British license on board, though war was then prevailing between England and this country, he was not liable for the proceeds accruing upon a sale of the cargo; though the result would have been different if the principal had not known that the license was on board: *Chappell v. Wysham*, 4 Hayes & J. 560.

Lottery Tickets. — No action will lie against an agent for the sale of lottery tickets to recover the proceeds thereof, where the sale of lottery tickets is unlawful; for the agent is a participant in the unlawful act, and the plaintiff must rely upon the illegal contract of agency: The principal case; *Hunt v. Knickerbocker*, 5 Johns. 326; *Rolfe v. Delmar*, 7 Rob. (N. Y.) 80; *Udall v. Metcalf*, 5 N. H. 396; see *Roby v. West*, 4 Id. 285; *Phalen v. Clark*, 19 Conn. 421; S. C., 50 Am. Dec. 253. So a contract of purchase of a lottery ticket, the sale of which was prohibited by law, cannot be enforced by action. Nor will the purchaser be entitled to recover in an action for money had and received upon proof that the seller of the ticket received the amount of the prize-money drawn by the ticket: *Eberman v. Reitzel*, 1 Watts & S. 181. If, however, the obligation to pay over the proceeds of the sale of lottery tickets can be separated from the illegal contract to sell them, as in the principal case, where one agent received from another agent the proceeds of the latter's sales, an action will lie.

Liquor. — Where the plaintiff and his book-keeper shared the gains from illegal sales of whisky, the fact that the book-keeper was the more immediate participant in the fraud will not enable his principal to sue for his own share of the illicit gains: *Curran v. Downs*, 7 Mo. App. 329.

Sale of Stolen Bond. — Where A places a bond in the hands of B, for sale or collection, both understanding that it had been stolen from the owner, and B sells it, and refuses to pay over the proceeds, A cannot recover them from him: *Kirk v. Morrow*, 6 Heisk. 445. But see *Pointer v. Smith*, 7 Id. 137.

AGENTS OF UNLAWFUL CORPORATIONS, ETC. — An agent who does business for a foreign insurance company, when neither he nor the company have complied with the statutory requirement regarding foreign companies, is not liable to account to the company: *Thorne v. Travellers' Ins. Co.*, 80 Pa. St. 18.

But see *contra*, *Berkshire v. Evans*, 4 Leigh, 223, which was an action by an unincorporated bank, doing business contrary to law, against a defaulting agent; and *Norton v. Blinn*, 39 Ohio St. 145 (action to recover profits from dealing in options). See also *Newbold v. Sims*, 2 Serg. & R. 317. So insurance brokers who act in behalf of two persons, who are jointly issuing risks in the name of one of them alone, contrary to the provisions of a statute which prohibits two or more individuals to engage in the insurance business jointly, are not liable for premiums received on policies effected by them: *Booth v. Hodgson*, 6 Term Rep. 405. And so where a banker filed a bill against his trustee, for an account of some shares in a mercantile establishment owned by the plaintiff, his bill was dismissed, on the ground that the statute prohibited a banker from engaging or being interested in trading: *Otley v. Browne*, 1 Ball & B. 360; see *Joy v. Cambell*, 1 Schoales & L. 328, 339.

Marriage Licenses.—Where an ordinary issues marriage licenses in blank, to a person who is unauthorized to dispose of them, or to determine the rights of parties to receive them, his action is illegal, and he cannot recover the amounts received by such person for licenses so disposed of by him under a contract express or implied: *Brewer v. Kingsberry*, 69 Ga. 754.

Contrary Decisions.—In a matter of the kind under discussion, where a consistent adherence to the law is at times productive of apparent injustice, since it may be said that an innocent defendant cannot set up the illegality of the contract under which the money was received, while a guilty defendant, who has participated in the illegal act, may avail himself of the defense, we should expect to meet with some conflict of authority. These cases are, however, fewer in number than might reasonably be expected, and in view of the great majority which maintain the distinction above shown, they cannot be considered as authoritative. These cases take the ground that, as against his principal, an agent cannot set up the illegality of his agency. Thus in *Pointer v. Smith*, 7 Heisk. 137, it was held that a confederate, employed by a unionist during the war to let slaves in the South, was liable in an action for the proceeds of his contracts of hiring. *Gilliam v. Brown*, 43 Miss. 642, is to a like effect. And see also *Baldwin v. Porter*, 46 Vt. 402; *Lestapies v. Ingraham*, 5 Penn. & W. 71; *Mayor v. Draper*, 23 Barb. 425. In *Snell v. Pells*, 113 Ill. 145, it is held, rather abruptly, and without due regard to authority, that an agent who has received money of his principal upon a contract which he procured to be executed cannot defend upon the illegality of the contract, if the contract is merely contrary to public policy, and there is nothing immoral or criminal in it. The contract in question consisted of subscriptions obtained by the director of a railroad, acting as agent for the contractors, from interested parties, for the purpose of having a station located at a certain town on the line of the road. The court also contended that the contract was valid, but placed its decision upon the ground above stated. The distinction is supported, however, neither by reason nor authority. It should be added that two members of the court, justices Walker and Scott, did not concur "either in the reasoning or conclusion in this case," and that Justice Mulkey was not present.

In conclusion, it may be not improper to reiterate what has already been indicated above, — that it is mere sentiment, and not real justice, that will consider the rights of two parties who are both participants in an illegal contract. "Honor among thieves" is a sentiment partaking much of idealism; and material courts will not assist "thieves" by enforcing any of their alleged rights against each other. It is true, as Lord Mansfield has said, that the

defense of illegality always sounds ill in the mouth of the defendant; but it is not with the demeanor of any particular defendant that a court of justice is concerned, but with a wise principle of jurisprudence which discounts illegal contracts by refusing to enforce them, or to rescind them after they are executed.

CITATION OF PRINCIPAL CASE. — In *Hardy v. Stonebraker*, 31 Wis. 647, it was held, citing the principal case, that an agreement between A and B, that if B will procure a purchaser of certain land belonging to A, at the price of eight thousand dollars, A will pay B three thousand dollars thereof, was not illegal and void; and after such purchase by C, and payment of the money to A, the latter could not be heard to deny his liability to B for the three thousand dollars (C not seeking any relief against the transaction), on the ground that B effected the sale by fraudulently concealing from C the fact that he was acting as A's agent in the negotiation, and fraudulently advising C as a friend that the property was well worth eight thousand dollars, and could not be obtained for less, while in fact A was willing to part with it for five thousand dollars.

MECKLEM v. BLAKE.

[22 WISCONSIN, 496.]

COVENANT OF SEISIN IS COVENANT OF INDEMNITY AGAINST ACTUAL DAMAGE arising from want of lawful title; and it runs with the land until such damage has actually arisen to the party holding possession under the deed.

GRANTEE CAN RECOVER FOR BREACH OF COVENANT OF SEISIN NO MORE THAN NOMINAL DAMAGES, if at all, where there has been no eviction or other actual injury.

GRANTEE DESIRING TO RESCIND FOR WANT OF TITLE AND TO RECOVER PURCHASE-MONEY paid, and interest, must first tender his grantor a reconveyance and the possession.

STATUTE PROVIDING THAT TEN YEARS' ADVERSE POSSESSION UNDER TAX DEED shall bar title of original owner applies to such possession commencing before the passage of the statute, if a reasonable portion of the term remained after its passage in which he might have commenced suit; otherwise the former limitation of twenty years applies.

JUDGMENT FOR DEFENDANT WILL NOT BE REVERSED where plaintiff would be entitled to no more than nominal damages.

ACTION for breach of covenants of seisin and against encumbrances. The opinion states the case.

Hugh Cunning, for the appellant.

A. M. Blair, for the respondent.

By Court, DIXON, C. J. This case presents the vexed question of the measure of damages in an action for a breach of the covenant of seisin, where the covenantee has entered and held possession of the land under the deed without ouster or eviction by paramount title, and without having sustained

any real injury in consequence of the alleged breach. In this country there is an irreconcilable conflict of decisions upon the question. In some, perhaps most, of the states, no distinction is taken between a nominal and a substantial breach of the covenant,—a breach by which the covenantee sustains no injury, and one where he is actually injured; and it is held that the covenant is broken as soon as made, and becomes at once a chose in action, not assignable at common law, and not passing by descent or conveyance of the land; and that on such merely nominal breach, the covenantee, though still possessed of the land, may sue for and recover back the purchase-money paid, and interest upon the same for such length of time as he himself may be liable for the use and occupation of the premises to the rightful owner. Several decisions to this effect are cited by Judge Downer in his opinion in *Noonan v. Hsley*, 21 Wis. 138, and others may be found in the note to *Spencer's Case*, 1 Smith's Lead. Cas. 164, 165. This doctrine has been carried so far as to hold that full damages may be recovered on a covenant for seisin or against encumbrances, even when the land has been conveyed by the covenantee before action brought without warranting the title, and for as much or even more than he originally gave: *Davis v. Lyman*, 6 Conn. 249; *Cornell v. Jackson*, 3 Cush. 509; *Bickford v. Page*, 2 Mass. 455; *Bennett v. Irwin*, 3 Johns. 363. On the other hand, the English courts, and with them the courts of several of the states, make a distinction between a mere formal breach, from which no real damage results, and a final or complete breach, by which the possession of the land is lost, or other actual injury ensues. These courts hold that where the covenantor is in possession, claiming title, and delivers the possession to the covenantee, the covenant of seisin is not a mere present engagement, made for the sole benefit of a covenantee, but that it is a covenant of indemnity entered into in respect of the land conveyed and intended for the security of all subsequent grantees, until the covenant is finally and completely broken; and they consequently hold that no such right of action accrues to the covenantee on the mere nominal breach, which always happens the moment the covenant is executed, as is sufficient to merge or arrest the covenant in the hands of the covenantee, or to deprive it of the capacity of running with the land for the benefit of the person holding under the deed when an eviction takes place, or other real injury is actually sustained. The possession of the land, or seisin in fact, under

the deed, by the covenantee or those claiming through him, is considered such an estate as carries the covenant along with it; and whilst some of the cases hold that such possession or seisin, so long as it remains undisturbed, satisfies the covenant, so that no action can be maintained until a right of substantial recovery exists, consequent upon an eviction or other actual loss, it is, or seems to be, the opinion of the courts in others, that there may be an action by the covenantee for the formal breach, in which only nominal damages can be recovered. It is not required of us here to express an opinion as to which of these views may be more correct, since the result in this action would be the same, whichever view was taken. It is enough that both result in establishing the same proposition, which is, that the covenant is a covenant of indemnity against actual damage arising from want of lawful title, and that it runs with the land until such damage has actually arisen to the party holding possession under the deed.

The English decisions, to which reference is made, are *Kingdon v. Nottle*, 1 Maule & S. 355, *King v. Jones*, 5 Taunt. 418, and *Kingdon v. Nottle*, 4 Maule & S. 53. These have been followed in Indiana: *Martin v. Baker*, 5 Blackf. 232; *Overhiser v. McAllister*, 10 Ind. 41; in Ohio: *Backus v. McCoy*, 3 Ohio, 211 [17 Am. Dec. 585]; *Foot v. Burnet*, 10 Id. 317 [36 Am. Dec. 90]; *Devore v. Sunderland*, 17 Id. 52 [49 Am. Dec. 442]; and in Missouri: *Dickson v. Desire*, 23 Mo. 151. Such also is the practical effect of the decision in New Hampshire: *Morrison v. Underwood*, 20 N. H. 869, where it was held that upon breach of the covenant of seisin, no more than nominal damages can be recovered, unless it appears that the grantee has suffered some actual injury. And the same doctrine is directly sustained in South Carolina, where the covenant against encumbrances is similarly interpreted, and it is held that the right of action passes with a transfer of the land, and vests in the party on whom the weight of the encumbrance falls, and not in the original covenantee: *McCrary v. Brisbane*, 1 Nott & McC. 104 [9 Am. Dec. 676]; *Jeter v. Glenn*, 9 Rich. 376. And it gains much additional strength from the decisions in several other states, where it is held that upon the covenant against encumbrances, which, like the covenant of seisin, is broken, if at all, as soon as made, the covenantee can found no right to actual damages on the mere existence of the encumbrance, but will be limited to a nominal recovery, unless he has paid

off the encumbrance, or actually lost the estate in consequence of it: *Delavergne v. Norris*, 7 Johns. 358 [5 Am. Dec. 281]; *Bean v. Mayo*, 5 Me. 94; *Richardson v. Dorr*, 5 Vt. 9; *Stannard v. Eldredge*, 16 Johns. 254; *Prescott v. Trueman*, 4 Mass. 627 [3 Am. Dec. 246]; *Wyman v. Ballard*, 12 Id. 804; *Taft v. Adams*, 8 Pick. 547; *Leffingwell v. Elliott*, 8 Id. 457 [19 Am. Dec. 343]; *Harlow v. Thomas*, 15 Id. 66. If the encumbrance may never be enforced, and the covenantee never injured by it, so the outstanding paramount title may never be asserted, and no damage ever result from that. If the covenantee is not permitted to recover the amount of the encumbrance without having discharged it, because he may thus retain both the land and the money so recovered, it would seem that he ought not to be allowed to recover the consideration money and interest, and at the same time to retain possession of the land under a title which may never be disturbed, or the defects of which may be remedied by the payment of an inconsiderable sum, or by the mere lapse of time without the payment of any money at all.

This doctrine is furthermore supported by the decisions of this and other courts, that where a deed is made and accepted, and possession taken under it, want of title will not enable the purchaser to resist the payment of the purchase-money while he retains the deed and possession, and has been subjected to no inconvenience or expense on account of the defect of title: *Taft v. Kessel*, 16 Wis. 273; *Horton v. Arnold*, 18 Id. 212; *Ludlow v. Gilman*, 18 Id. 552; *Hall v. Gale*, 14 Id. 54; *Hill v. Butler*, 6 Ohio St. 207; *Small v. Reeves*, 14 Ind. 163. Nothing could be more inconsistent than to hold that the purchaser in possession cannot resist an action to compel payment of the purchase-money, and yet that he may turn around and immediately recover it back by suit upon the covenant of seisin.

On the whole, after the fullest consideration of the question and examination of the authorities, we are satisfied that the decisions of the English courts, and of the courts in this country in which they have been followed, furnish the only sound and just rule for the interpretation of the covenant of seisin. We, therefore, without hesitation, adopt it, and deem it unnecessary at this time to enter more at large into the reasons for this conclusion, since they are so fully illustrated in the several cases to which reference has been made.

We proceed now to apply the rule to the case before us.

Blake, being in possession under color of title, claiming adversely, sold and conveyed the premises, with covenants of seisin and against encumbrances, to Mecklem, who entered under the deed, and held possession for several years, until a mortgage executed by him to secure a portion of the purchase-money was foreclosed, and the premises sold and possession delivered to the purchaser pursuant to the judgment. About one year afterward, this action was commenced, in which it is neither claimed nor shown that Mecklem was ever disturbed in the possession, or that he suffered any other actual damage by reason of the defect in Blake's title. In fact, the title to one of the lots (lot 11) became perfect by lapse of time before or about the time this action was commenced. It had been occupied by Blake and his assigns, under claim of title, exclusive of any other right, founded on the tax deed to Farwell of June 7, 1845, for the period of ten years. This, under the present statute (R. S. 1858, c. 138, secs. 6, 10), barred the title of the original owner. This statute is applicable because a reasonable portion of the term limited remained after its passage, in which the original owner might have commenced suit: *Smith v. Packard*, 12 Wis. 371; *Howell v. Howell*, 15 Id. 55. The same was not true, however, of lot 7, which is governed by the statute of 1849, and required an adverse possession of twenty years: R. S. 1849, c. 127, secs. 6, 7. That lot having been adversely possessed for the period of ten years before the statutes of 1858 took effect, the limitation of ten years was inapplicable: *Osborn v. Jaines*, 17 Wis. 573. But be this as it may, it is obvious that Mecklem has suffered no damage in consequence of the defect. The result to him would have been the same had Blake's title been indefeasible. In no event can he recover more than nominal damages. The conveyance by the foreclosure is the same as if he himself had voluntarily conveyed. If he desired to rescind for want of title, and to recover back the purchase-money paid and interest, he should have tendered Blake a reconveyance and the possession, and then he could have maintained his action: *Taft v. Kessel*, *supra*. As it is, he has sustained no real injury; and we are not required to say whether he was entitled to nominal damages or not. If he was, and the circuit judge erred in instructing the jury that their verdict must be for the defendant, still the judgment would not for that reason be reversed: *Laubenheimer v. Mann*, 19 Wis. 519.

Judgment affirmed.

MEASURE OF DAMAGES FOR BREACH OF COVENANT OF SEISIN OR GOOD RIGHT TO CONVEY. — The measure of damages for a total breach of these covenants, where nothing passes to the grantee by the conveyance, is the amount of the consideration paid, with interest. In the earlier cases, it was sought to hold the covenantor liable for the increased value of the land, and for the value of improvements made after the purchase; but it was held — adhering to the policy of the law exhibited under the old warranty, and on the ground that it would be unjust to make the grantor liable for accidental increase in value, and for improvements made without his privity or sanction — that the true measure of damages was the value of the land at the time of the sale as agreed upon by the parties, and shown by the amount of the consideration paid, together with interest upon that sum: *State v. Ten Eyck*, 3 Caines, 111; S. C., 2 Am. Dec. 254, per Kent, C. J.; *Bender v. Fromberger*, 4 Dall. 442; *Pitchee v. Livingston*, 4 Johns. 1; S. C., 4 Am. Dec. 229. And the rule as thus laid down in the early cases has never been departed from, but has been adopted and substantially followed in all of the subsequent decisions: *Logan v. Moulder*, 1 Ark. 323; *Horsford v. Wright*, Kirby, 3; S. C., 1 Am. Dec. 8; *Michell v. Hasen*, 4 Conn. 495; *Gilbert v. Bulkley*, 5 Id. 262; S. C., 13 Am. Dec. 57; *Sterling v. Peet*, 14 Conn. 245; *Hartford etc. Co. v. Miller*, 41 Id. 112; *King v. Gibson*, 32 Ill. 348; S. C., 83 Am. Dec. 269; *Weber v. Anderson*, 73 Ill. 439; *Frazer v. Supervisors*, 74 Id. 282; *Lacey v. Marnan*, 37 Ind. 168; *Swafford v. Whipple*, 3 G. Greene, 261; S. C., 54 Am. Dec. 493; *Cox v. Strobe*, 2 Bibb, 277; *Dale v. Shively*, 8 Kan. 276; *Stubbs v. Page*, 2 Me. 378; *Spring v. Chase*, 22 Id. 505; S. C., 39 Am. Dec. 595; *Montgomery v. Reed*, 69 Mo. 510; *Crenfield v. Storr*, 36 Md. 150; *Marston v. Hobbs*, 2 Mass. 433; S. C., 3 Am. Dec. 61; *Caswell v. Wendell*, 4 Mass. 108; *Nichols v. Walter*, 8 Id. 243; *Leland v. Stone*, 10 Id. 459; *Smith v. Strong*, 14 Pick. 128; *Kapley v. Lebeaume*, 1 Mo. 550; *Martin v. Long*, 3 Id. 391; *Collier v. Gamble*, 10 Id. 472; *Lawless v. Collier*, 19 Id. 472; *Dickson v. Disard*, 23 Id. 151; S. C., 66 Am. Dec. 661 (cited to this effect in *City of St. Louis v. Bissell*, 46 Mo. 160; *Kirkpatrick v. Downing*, 58 Id. 38; *Walker v. Deaver*, 79 Id. 769; *Walker's Adm'r v. Deaver*, 5 Mo. App. 146; *Ward v. Ashbrook*, 78 Id. 517); *Phipp v. Tarpoley*, 31 Id. 443; *Willson v. Willson*, 25 N. H. 229; S. C., 57 Am. Dec. 320; *Parker v. Brown*, 15 N. H. 176; *Nutting v. Herbert*, 35 Id. 120; *Wilson v. Forbes*, 2 Dev. 30; *Price v. Deal*, 90 N. C. 290; *Backus v. McCoy*, 3 Ohio, 211; S. C., 17 Am. Dec. 585; *Clark v. Parr*, 14 Ohio, 121; *Weiting v. Nissley*, 13 Pa. St. 655; *Park v. Check*, 4 Cold. 20; *Blake v. Burnham*, 29 Vt. 437; *Rich v. Johnson*, 2 Pinn. 86; 1 Chand. 19; S. C., 52 Am. Dec. 144; *Blossom v. Knox*, 3 Chand. 296; *Messer v. Oestreich*, 52 Wis. 695. Nor can the increased value of the land, arising from the rise in the value of improvements, be recovered in an action for a breach of the covenant of seisin: *Willson v. Willson*, 25 N. H. 229; S. C., 57 Am. Dec. 320; and the grantee is left to his remedy against the evictor, who has established a paramount title, to obtain pay for improvements: *Conrad v. Druids' Grand Grove*, 64 Wis. 258. Where, however, "for some purpose of the vendor, the purchaser, as part of the consideration of the sale, undertakes to make improvements upon the purchased property, it would be manifestly just, and in accord with general principles, that, in case of a subsequent loss of the property by reason of a defect of title, the value of such improvements should be included in the assessment of damages": 2 Sutherland on Damages, 260; Rawle on Covenants, 4th ed., 256.

Costs in Ejectment Suit, where the covenantee has contested this action against the holder of the paramount title, may also be recovered, in addition to the consideration money and interest: *Cox v. Strobe*, 2 Bibb, 277; *Cris-*

field v. Storr, 36 Md. 150; *Willson v. Willson*, 25 N. H. 229; S. C., 57 Am. Dec. 320; *Staats v. Ten Eyck*, 3 Caines, 111; S. C., 2 Am. Dec. 254; *Pitchee v. Livingston*, 4 Johns. 1; S. C., 4 Am. Dec. 229; *Messer v. Oestreich*, 52 Wis. 695; but not the costs of the action for mesne profits: *Staats v. Ten Eyck*, *supra*. Taxes which had been paid on the land were also included in the damages, in *Fraser v. Supervisors*, 74 Ill. 282.

Exchange of Lands. — If the consideration of the deed be land, by way of exchange, the value of that land at the time of the deed, with interest, will be the measure of damages: *Lacey v. Marnan*, 37 Ind. 168; *Cummins v. Kennedy*, 3 Litt. 118; S. C., 14 Am. Dec. 45; *Hodges v. Thayer*, 110 Mass. 286. Compare *Farmers' Bank v. Glenn*, 68 N. C. 35; *Bonnon v. Urton*, 3 G. Greene, 228; *Davis v. Hall*, 2 Bibb, 590.

Conflict of Laws. — Where the action is brought in one state, and the land is situated in another, the damages are to be assessed according to the rule adopted in the former state: *Smith v. Strong*, 14 Pick. 128.

CONSIDERATION, HOW PROVED. — *Consideration Expressed in Deed is Prima Facie Evidence* of the value of the land at the time of the sale. In strictness, the rule of damages should be stated to be the value of the land at the time of the sale as fixed by the parties; but this is always the amount of the consideration paid, if that can be ascertained. And, in determining this amount, the consideration expressed in the deed is *prima facie* evidence of the consideration paid: *Marston v. Hobbs*, 2 Mass. 433; *Smith v. Strong*, 14 Pick. 128; *Tapley v. Lebeaume*, 1 Mo. 550; *Cummins v. Kennedy*, 3 Litt. 118; S. C., 14 Am. Dec. 45.

Real Consideration may be Shown by Parol. "On this side of the Atlantic, it may be considered as settled that, although (apart from the question of fraud) evidence to contradict or vary the consideration clause is inadmissible, if offered to defeat the conveyance as such (as, for example, by showing it void because of want of consideration), yet, that for any purpose short of affecting the title, this clause is not conclusive, but only *prima facie* evidence of the amount therein named": Rawle on Covenants, 5th ed., sec. 173. Therefore, in an action for the breach of a covenant of seisin, the plaintiff may, by parol evidence, show that the real consideration of the conveyance was a greater sum than that stated in the deed, for the purpose of increasing the damages: *Belden v. Seymour*, 8 Conn. 304; S. C., 21 Am. Dec. 661; *Dexter v. Manley*, 4 Cush. 26; *Guinotte v. Chouteau*, 34 Mo. 154; and, on the other hand, the defendant may in the same way show that it was a less sum, for the purpose of diminishing the damages: *Martin v. Gordon*, 24 Ga. 535; *Fields v. Willingham*, 49 Id. 344; *Swafford v. Whipple*, 3 G. Greene, 261; S. C., 54 Am. Dec. 498; *Williamson v. Test*, 24 Iowa, 139 (wherein it was shown that the lot was paid for with a watch); *Blood v. Wilkins*, 43 Id. 567; *Wachendorf v. Lancaster*, 66 Id. 458; *Harlow v. Thomas*, 15 Pick. 70; *Moore v. McKie*, 5 Smedes & M. 238; *Morse v. Shattuck*, 4 N. H. 229; S. C., 17 Am. Dec. 419; *Bingham v. Weiderwax*, 1 N. Y. 514; *Vail v. Junction R. R. Co.*, 1 Cin. Rep. 571; *Cox v. Henry*, 32 Pa. St. 19; *Patrick v. Leach*, 1 McCrary, 250. And the defendant may also show that the portion of the land to which there was no title was included in the deed by mistake, and that there was no consideration paid for it: *Leland v. Stone*, 10 Mass. 463; *Barnes v. Learned*, 5 N. H. 284; *Nutting v. Herbert*, 35 Id. 127; S. C., 37 Id. 346; *Stewart v. Hadley*, 55 Mo. 235. But such evidence is admissible only in mitigation of damages, and not to negative a breach of the covenant, for this would be in effect contradicting or varying the deed: *Nutting v. Herbert*, *supra*; see *Estabrook v. Smith*, 6 Gray, 578; S. C., 66 Am. Dec. 445. So where a trustee

was held to be personally liable on his covenants, he could not show that the consideration was not wholly or in part received by him or for his use: *Bloom v. Wolfe*, 50 Iowa, 286. And parol evidence that the plaintiff knew that the defendant had not title to a part of the land described has been held to be inadmissible to show that no consideration was paid for that part: *Wadhams v. Jones*, 4 Ill. App. 642.

When Consideration not Ascertainable. — When no consideration is named in the deed, and it is not ascertainable, *Smith v. Strong*, 14 Pick. 128, or where the conveyance is the result of negotiations with a third person, as where a person owing a debt procured the defendant to convey a tract of land to the plaintiff, his creditor, who agreed to receive it in satisfaction of the debt, and there is therefore no privity between plaintiff and defendant respecting the consideration paid, *Byrnes v. Rich*, 5 Gray, 518, resort must be had to the actual value of the land, and the damages will be measured by the value of the land at the time of the conveyance, with interest. So where the defendant was a stranger to the consideration, except as to a part which he received upon the subsequent execution of the deed, the measure of damages was held to be the value of the land at the time of the conveyance, or at the election of the plaintiff, the amount actually received by the defendant: *Staples v. Dean*, 114 Mass. 125; see *Recofs v. Younglove*, 8 Baxt. 385.

It is immaterial, however, that the consideration was paid or delivered to another person than the grantor; or that it was, before delivery, the property of another than the grantee; provided that it is agreed upon between the grantor and the grantee as the consideration upon which the deed is given. For their agreement creates a privity between them in respect to the consideration, and makes it the contract price of the conveyance, and it is therefore the measure of the grantee's loss: *Hodges v. Thayer*, 110 Mass. 286.

DAMAGES TO ASSIGNEE. — Where the covenant of seisin is held to run with the land, and the suit is by the assignee of the covenantee, then the measure of damages is not the consideration mentioned in the covenantor's deed (for if that were so, there might in some cases be a recovery for much more than the assignee had paid for the property), but the consideration which the assignee has paid to his immediate grantor, with interest from the date of the eviction and costs in the ejectment suit, with this limitation, however, that the recovery cannot be for an amount exceeding the consideration received by the covenantor for the same lands: *Oriafeld v. Storr*, 36 Md. 150; *Dickson v. Distri*, 23 Mo. 151; S. C., 66 Am. Dec. 661. Where the grantee has purchased in the adverse title, the measure of damages is the amount paid: See *infra*; but where he assigns the covenants in the deed of his grantor, as a part of the consideration paid for the adverse paramount title, the assignee is entitled to the full amount of the purchase-money in an action on the covenant of seisin: *Lawless v. Collier*, 19 Mo. 480.

FRAUD. — "It must not be supposed that, in an action on the covenant, fraud can be taken advantage of by the purchaser to increase his damages. So long as the distinction is preserved between tort and contract, so long must the remedy be by action in the nature of a writ of deceit, and not by action of covenant": *Rawle on Covenants*, 5th ed., sec. 159, citing *Carvill v. Jacks*, 43 Ark. 439.

INTEREST FOR WHAT TIME. — Where the grantee has not been in possession, or his occupancy has not been beneficial, and productive of rents and profits, he may recover interest for the whole period from the date of the conveyance: *Spring v. Chase*, 22 Me. 505; S. C., 39 Am. Dec. 595; *Lawless v. Collier*, 19 Mo. 480. The fact that the vendee received no rents and profits

from the premises cannot be taken into consideration to reduce damages, as a person purchasing real estate is presumed to do so because the rents and profits will be equivalent to the interest of the money he pays for it: *Spring v. Chase*, 22 Me. 506; S. C., 39 Am. Dec. 595. So the grantee may recover interest, though he has not been in possession, for the money due to the owner for rents and profits constitutes a distinct and separate claim: *Mitchell v. Hansen*, 4 Conn. 496.

On the other hand, if there has been a beneficial occupancy, and the grantee has been in the enjoyment of rents and profits up to the time of the action on the covenant or to the time of eviction, he can recover interest only for the time during which he is liable for mesne profits, which varies under different statutes, the time being generally from four to six years immediately prior to the eviction: *Lawless v. Collier*, 19 Mo. 490; *Hutchins v. Roundtree*, 77 Id. 500; *Clark v. Parr*, 14 Ohio, 118; *Staats v. Ten Byck*, 3 Caines, 111; S. C., 2 Am. Dec. 254; *Semple v. Whorton*, 68 Wis. 626; *Conrad v. Druids' Grand Grove*, 64 Id. 258; *Messer v. Oestreich*, 52 Id. 695. But in Illinois the plaintiff was permitted to recover the consideration money and interest for the whole period, together with the taxes paid on the premises, less the value of the rents received, or which could have been received, by the grantee from the land: *Fraser v. Supervisors*, 74 Ill. 282. Interest for the whole period will be computed from the date of the deed: *Smith v. Strong*, 14 Pick. 128; or from the time of payment: *Spring v. Chase*, 22 Me. 506; S. C., 39 Am. Dec. 595; to the time of the judgment: *Caswell v. Wendell*, 4 Mass. 106; note to *Cooke v. England*, 92 Am. Dec. 630.

NOMINAL DAMAGES ONLY WHEN NO PROOF OF ACTUAL LOSS. — Though the breach of the covenant of seisin occurs, if at all, upon the delivery of the deed, and the measure of damages will be ordinarily the consideration money and interest, because the grantee takes nothing by his deed, still, the general rule that actual damages only are recoverable for breach of contracts applies here as elsewhere: *Willson v. Willson*, 25 N. H. 229; S. C., 57 Am. Dec. 320; *Hartford etc. Co. v. Miller*, 41 Conn. 112. And though there may have been a technical breach of the covenant, there may have been no actual loss to the purchaser, and he may be in the same condition as when the covenant was executed. Under these circumstances, it is maintained in some cases that no recovery can be had except for nominal damages, unless the grantee has been compelled, by the assertion of a paramount title, to yield possession to the claimant, or has suffered some other substantial injury, on the ground that it would be manifestly inequitable to permit the plaintiff to recover the consideration money and interest, and still retain possession of the land, which might, by lapse of time, ripen into a perfect title: *Boon v. McHenry*, 55 Iowa, 202; *Norman v. Winch*, 65 Id. 263; *Henke v. Johnson*, 62 Id. 555; *Collier v. Gamble*, 10 Mo. 473; *Lawless v. Collier*, 19 Id. 480; *Cockrell v. Proctor*, 65 Id. 41; *Clark v. Bullock*, 65 Id. 535; *Conklin v. Hannibal etc. R. R. Co.*, 65 Id. 533; *Walker v. Deaver*, 79 Id. 675; *Farmers' Bank v. Glenn*, 68 N. C. 35; *Haynes v. White*, 55 Cal. 38; *Noonan v. Holey*, 22 Wis. 27; *Baton v. Lyman*, 30 Id. 45; *Oakes v. Estate of Buckley*, 49 Id. 600; *Smith v. Hughes*, 50 Id. 625.

It is undoubtedly true that it should appear that the plaintiff has suffered actual loss, and that a mere uninjurious flaw in the title would give the plaintiff a right to no more than nominal damages; that the actual damage suffered will always ultimately measure the damages: *Hartford etc. Co. v. Miller*, 41 Conn. 112; *Willson v. Willson*, 25 N. H. 229; S. C., 57 Am. Dec. 320; *Kimball v. Bryant*, 25 Minn. 496. But though doubt is expressed, there seems to be no real reason why, when there is a total failure of title, the grantee

should not be allowed to recover full damages, although he has not yet been ousted by the holder of the paramount title: 2 Sutherland on Damages, 267, 268; Rawle on Covenants, 5th ed., sec. 176; *Parker v. Brown*, 15 N. H. 176, 188. He has received no title, and all that he takes, if he takes anything, is the possession. This the grantor may retake, if the grantee recovers full damages, and the parties are then in the same condition as before, for a reconveyance is not necessary to a recovery of the entire purchase-money, where the title has entirely failed, the record of the recovery estopping the grantee from asserting any title as against his grantor in the future: *Lawless v. Collier*, 19 Mo. 480; *Parker v. Brown*, 15 N. H. 176, 188; see *Rochs v. Younglove*, 8 Baxt. 385, 387; *Aberly v. Vilas*, 21 Wis. 109; *Tone v. Wilson*, 81 Ill. 529; *Flint v. Steadman*, 36 Vt. 210.

But if the possession of the purchaser has by lapse of time ripened into a valid title under the statute of limitation, his recovery on the covenant can be of no more than nominal damages, though there be a technical breach: *Pate v. Mitchell*, 23 Ark. 591; *Wilson v. Forbes*, 2 Dev. 30; *Cowan v. Silliman*, 4 Id. 47; *Somerville v. Hamilton*, 4 Wheat. 230; *Garfield v. Williams*, 3 Vt. 328. And a recovery of merely nominal damages may be pleaded in bar of any subsequent action on the covenant in this country: *Donnell v. Thompson*, 10 Me. 174; *Nosler v. Hunt*, 18 Iowa, 217; though in England this is not so, as the covenant is regarded as a continuing one, upon which successive recoveries may be had as often as damage is suffered: See *Boon v. McHenry*, 55 Id. 202. And when the plaintiff perceives that his action must result in nominal damages, his proper course is to discontinue, or suffer nonsuit, which will not bar a subsequent action: *Harris v. Newell*, 8 Mass. 263.

Nominal damages are denied in Ohio: *Backus v. McCoy*, 3 Ohio, 211; *Foots v. Burnett*, 10 Id. 318; *Devore v. Sunderland*, 17 Id. 52; see *Schofield v. Iowa Homestead Co.*, 32 Iowa, 317. And in Wisconsin, it is earnestly and ably contended by Dixon, C. J., that there should be no allowance of nominal damages in that state, because covenants of seisin are there held to run with the land: *Eaton v. Lyman*, 30 Wis. 41, and the principal case.

When Grantor Subsequently Acquires Perfect Title, Nominal Damages only are Recovered. After the execution of the deed containing the covenant of seisin, the vendor's title may become perfect, though at the time of the conveyance it was defective. This may occur by means of accident or of lapse of time, through the intervention of strangers or by reason of the grantor's own acts; and the grantor may buy in the outstanding paramount title. Then, by virtue of the covenants of the deed, or of the doctrine of estoppel, this after-acquired title may inure to the grantee. This perfects his title; and if not otherwise damaged, it is held that he can recover only nominal damages for the technical breach existing at the time of the conveyance: *Morrison v. Underwood*, 20 N. H. 369; *Baxter v. Bradbury*, 20 Me. 260; *Farmers' Bank v. Glenn*, 68 N. C. 35; *Hartford etc. Co. v. Miller*, 41 Conn. 112; *Westbrook v. McMillan*, 1 Hill (S. C.), 317; S. C., 26 Am. Dec. 187; *King v. Gilson*, 32 Ill. 348; S. C., 83 Am. Dec. 269; *Knowles v. Kennedy*, 82 Pa. St. 445; *Burke v. Beveridge*, 15 Minn. 208; *Kimball v. Bryant*, 25 Id. 496, 500; *McCarty v. Leggett*, 3 Hill, 134 (denies even the right to nominal damages, but to this the case is not authority); *Noonan v. Haley*, 21 Wis. 138. And some cases maintain that even though the grantor acquires the title after suit brought on the covenant, still the plaintiff's damages will be reduced to a nominal sum merely: *King v. Gilson*, 32 Ill. 348; S. C., 83 Am. Dec. 269; *Reese v. Smith*, 12 Mo. 344. And in such case, it is said that the plaintiff can recover only the amount necessary to indemnify him for acts done by

the holder of the adverse title: *McInnis v. Lyman*, 62 Wis. 191. On the other hand, it is held, with perhaps more reason, that a defendant cannot give in evidence a title acquired by him subsequent to the bringing of the action; for the rights of the parties must be determined as they were at the time the action was begun: *Morris v. Phelps*, 5 Johns. 49; S. C., 5 Am. Dec. 323.

The majority of authority is as above stated, that nominal damages only are recoverable when the grantee's title has been perfected by inurement. But there are strong and weighty arguments to be made, which strenuously support the contrary conclusion, since the course of decisions above noted "fastens upon the purchaser the subsequently acquired title *volens volens*, depriving him of the option whether to accept it, or to fall back upon his covenants; or to put it in another form, it has virtually the same effect as an injunction restraining him from proceeding at law upon the covenants"; Rawle on Covenants, 5th ed., sec. 179; and see *Reese v. Smith*, 12 Mo. 344, a strong case in this direction, and one which plainly goes too far, for the purchaser was compelled, after suit, to take a title which had not even inured to him: See *Noonan v. Isley*, 21 Wis. 146; S. C., 22 Id. 32. There are also well-reasoned cases which clearly apprehend this view, that the election should be with the covenantee, and not with the covenantor; and in the light of their sound logic, the question can hardly be regarded as settled: See *Tucker v. Clarke*, 2 Sand. Ch. 96; *Bingham v. Weidewitz*, 1 N. Y. 509; *Burton v. Reeds*, 20 Ind. 93; *Blanchard v. Ellis*, 1 Gray, 199; see also *Noonan v. Isley*, 21 Wis. 146; S. C., 22 Id. 32; *Nichol v. Alexander*, 28 Wis. 130; *McInnis v. Lyman*, 62 Id. 191; see Rawle on Covenants, secs. 179-186.

DAMAGES FOR PARTIAL BREACH. — Upon a partial breach of the covenant of seisin, the rule is well settled that the covenantee recovers *pro tanto* only, and it seems that he cannot rescind and recover the whole consideration money: *Morris v. Phelps*, 5 Johns. 49; S. C., 4 Am. Dec. 323. In the early case of *Gray v. Briscoe*, Noy, 142, the grantor covenanted that he was seised of a fee, whereas in fact the land was a copyhold, and damages were directed to be given in the amount of the difference in value between a fee-simple and a copyhold estate, as valued by the county: See *Wace v. Bickerton*, 3 De Gex & S. 751. And so where a person covenants for a seisin in fee when he is seised only of a life estate, the covenantee recovers the consideration money less the value of the life estate: *Tanner v. Livingston*, 12 Wend. 83; *Lockwood v. Sturdevant*, 6 Conn. 373; *Recohs v. Younglove*, 8 Bart. 386; see *Rickert v. Snyder*, 9 Wend. 416; *Blanchard v. Blanchard*, 48 Me. 174. And life assurance tables are admissible to show the value of the life estate: *Mills v. Catlin*, 22 Vt. 98; *Donaldson v. M. & M. R. R. Co.*, 18 Iowa, 280. And so where a deed was made of an entirety in fee, with covenants of seisin, power to sell, and of warranty, and in fact the grantor was seised in fee of only two sixths of the premises, and had but a life estate in the other four sixths, it was held that the covenantee could recover only in proportion to the value of the part to which the title had failed, — that is, four sixths of the consideration money, less the value of the life estate; and interest was not allowed during the grantor's life, since the plaintiff could not be called upon for mesne profits during that period: *Guthrie v. Pugsley*, 12 Johns. 126; and see *Tone v. Wilson*, 81 Ill. 529; *Scantlin v. Allison*, 12 Kan. 851; *Ela v. Card*, 2 N. H. 175; S. C., 9 Am. Dec. 46; *Downer v. Smith*, 38 Vt. 464. And in general, following these cases, it may be considered as settled that, where the title fails in part, the recovery on the covenant of seisin will be *pro tanto* to the extent of the actual loss: See *Tierney v. Whiting*, 2 Col. 620; *Hubbard v. Norton*, 10 Conn. 435; *Phillips v. Reichert*, 17 Ind. 120; *Hoot v. Spade*, 20

Id. 326; *McNear v. McComber*, 18 Iowa, 14; *Dale v. Shively*, 8 Kan. 276; *Blanchard v. Hoxie*, 34 Me. 376; *Morrison v. McArthur*, 43 Id. 567; *Bryan v. Smallwood*, 4 Har. & McH. 483; *Lucas v. Wilcox*, 135 Mass. 77; *Furness v. Ferguson*, 15 N. Y. 443; *Adams v. Conover*, 22 Hun, 424; *Nyce v. Oberlin*, 17 Ohio, 76; *McAlpin v. Woodruff*, 11 Id. 125 (dower); *Terry v. Drabenstadt*, 68 Pa. St. 400 (dower).

Furthermore, when the land is sold for an entire consideration and the title fails to a part of the land, parol evidence may be heard as to the value of the part lost, and as to the value of the whole tract purported to be conveyed, and the measure of damages will be such a fractional part of the whole consideration paid as the value at the time of the purchase of the piece to which the title fails bears to the value of the whole piece purchased, and interest thereon: *Morris v. Phelps*, 5 Johns. 49; S. C., 4 Am. Dec. 323; *Weber v. Anderson*, 73 Ill. 439; *Wright v. Nipple*, 92 Ind. 310; *Major v. Dunnivant*, 25 Ill. 265; *Wadhams v. Innes*, 4 Ill. App. 642; *Mishke v. Baughn*, 52 Iowa, 528; *Semple v. Whorton*, 68 Wis. 626 (correcting a clerical error in the statement of the rule as contained in *Messer v. Oestreich*, 52 Wis. 696; inadvertently repeated in *Bartlett v. Braunsdorf*, 57 Id. 3; and *Docter v. Hellberg*, 65 Id. 424; wherein the words "whole purchase price" are used instead of "the value of the whole piece purchased"); *Blanchard v. Hoxie*, 34 Me. 376; *Blanchard v. Blanchard*, 48 Id. 177; *Cushman v. Blanchard*, 2 Me. 286; S. C., 11 Am. Dec. 76; *Leland v. Stone*, 10 Mass. 463; *Cornell v. Jackson*, 3 Cush. 510; *Ella v. Card*, 2 N. H. 178; S. C., 9 Am. Dec. 46; *Giles v. Dugro*, 1 Duer, 331; *Dickens v. Sheppard*, 3 Murph. 526; *Wallace v. Talbot*, 1 McCord, 467; *King v. Pyle*, 8 Serg. & R. 166; *Bedupland v. McKeen*, 28 Pa. St. 134; *Raines v. Catloway*, 27 Tex. 685; *Beverly v. Lawson*, 3 Munt. 317; *Nelson v. Matthews*, 8 Hen. & M. 164; *Butcher v. Peterson*, 26 W. Va. 447; *Griffin v. Reynolds*, 17 How. 611. And in *Semple v. Whorton*, 68 Wis. 626, it was held, Taylor, J., dissenting, that values at time of purchase may be shown by parol evidence, and are to be determined by the actual and visible conditions of the several parts at the time of the purchase, and not from the conditions then supposed to exist or contemplated by the parties. And so where several tracts are sold for an entire price per acre, and the title to one of the tracts which has valuable improvements on it is not in the grantor at the time of the sale, and neither of the parties had knowledge of the existence of the improvements, in ascertaining the measure of damages and the proportion of the purchase price recoverable, the value of the lost tract, including improvements at the time of the purchase, is to be estimated, and the ratio, between this value and the value of the whole tract at the same time, taken: Id.

It is also held in *Morris v. Phelps*, 5 Johns. 48, S. C., 4 Am. Dec. 323, that where the title to a part only of the land fails, the sale cannot be rescinded, and the whole consideration recovered back, but the plaintiff is restricted to his recovery of the proportionate loss. To the same effect, also, is *Phillips v. Richert*, 17 Ind. 122; and see also, as tending in this direction, *Wetherbee v. Bennett*, 2 Allen, 430; *Batchelder v. Sturgis*, 3 Cush. 301; *Butcher v. Peterson*, 26 W. Va. 447; *Rolph v. Crouch*, L. R. 3 Ex. 44. "And whatever may be the apparent or real hardship of the rule so laid down, there appears to be no escape from it in any purely common-law form of proceeding": Rawls on Covenants, 5th ed., sec. 187. Again, in *Smith v. Hughes*, 50 Wis. 625, it is held that a contract for the sale of land, fully executed by delivery of a deed with full covenants, and of possession of the land to the purchaser, cannot be rescinded; and especially where the vendor has not been guilty of any fraud or concealment, and the warrantor was solvent, and

the purchaser took with full knowledge of the property and of the title. And Orton, J., says: "The remark in the opinion of Chief Justice Dixon, in *Mecklem v. Blake*, 22 Wis. 495, intimating that a rescission might be made in such a case, was clearly *obiter*, and without due consideration."

WHEN GRANTEE BUYS IN OUTSTANDING TITLE, his recovery on the covenant of seisin is limited by the injury actually sustained, and he recovers only the amount paid by him, with interest from the time of payment, provided this sum is less than the amount recoverable for a total breach, — that is, the consideration and interest, for the recovery cannot exceed this sum: *Spring v. Chase*, 22 Me. 505; S. C., 39 Am. Dec. 595; *Weber v. Anderson*, 73 Ill. 439; *Farmers' Bank v. Glenn*, 68 N. C. 35; *Price v. Deal*, 90 Id. 290, 295; *Lawless v. Collier*, 19 Mo. 480. And damages arising from the existence of a prior mortgage are determined by the amount due on the mortgage: *Gilbert v. Bulkley*, 5 Conn. 262; S. C., 13 Am. Dec. 57.

So, also, where the title of the grantor fails as to a part of the land conveyed, and the grantee buys in the outstanding title, the measure of damages being the sum paid for that title, provided it does not exceed the purchase-money of that part, in order to determine whether it did exceed that amount, it becomes necessary for a jury to ascertain the relative value of that parcel, and in doing so the rule for their guidance is not the proportion in quantity, but such proportion as the value of the land covered by the title paramount bears to the value of the whole land estimated by the consideration. And if the amount paid to extinguish the outstanding title shall be found to be more than the assessed value of that part, then the amount so assessed shall be the measure of damages: *Price v. Deal*, 90 N. C. 290, 295. Furthermore, it is held that though where the grantee has purchased in the adverse title the measure of damages is the amount paid, yet, where the grantee assigns the covenants in the deed of his grantor as a part of the consideration paid for the adverse paramount title, the assignee is entitled to the full amount of the purchase-money in an action on the covenant of seisin: *Lawless v. Collier*, 19 Mo. 480.

The measure of damages in general is the actual loss: *Willson v. Willson*, 25 N. H. 229; S. C., 57 Am. Dec. 320. And if the vendee takes any benefit from the deed, directly or indirectly, either through its own force or by the acts of others, the value of that benefit is to be considered in estimating the damages: *Hartford etc. Co. v. Miller*, 41 Conn. 112; and see *Morrison v. Underwood*, 20 N. H. 369.

THE PRINCIPAL CASE IS CITED to the point that a vendee in possession of land under a contract of sale may have his action against his vendor to recover back the purchase-money paid when he becomes entitled to his deed under his contract, by making a tender of the balance of the purchase-money, and surrendering the possession to his vendor; but he is not bound to surrender such possession, and may rely on the contract of his vendor to make his title good and hold the possession until he is evicted by the real owner; and if he does so, his cause of action will not accrue until he is evicted: *Oakes v. Estate of Buckley*, 49 Wis. 600. But after the contract has become fully executed by delivery of a deed, with full covenants, to the purchaser, together with the possession of the land, it cannot be rescinded; and especially where the vendor has not been guilty of any fraud or concealment, and the warrantor was solvent, and the purchaser took with full knowledge of the property and of the title thereto: *Smith v. Hughes*, 50 Id. 625, in which case Orton, J., says, in delivering the opinion of the court: "The remark in the opinion of Chief Justice Dixon in *Mecklem v. Blake*, 22 Id. 495, intimating

that a rescission might be made in such a case, was clearly *obiter*, and without due consideration." An action to recover anything more than nominal damages will not lie until after eviction by paramount title or other actual injury: *Id.* Chief Justice Dixon, in a dissenting opinion to *Baton v. Lyman*, 30 Id. 46, and again in *S. C.*, 33 Id. 40, adheres to his opinion that nominal damages cannot be recovered in an action for a breach of covenant of seisin or encumbrances, since these covenants run with the land; and he cites the principal case. The principal case is approved and followed upon the point that a right of action already accrued may be barred, provided a reasonable time be given after the passage of the act for a party to prosecute: *Baker v. Supervisors*, 39 Id. 448; *Hyde v. Supervisors*, 43 Id. 136; *Arimond v. Green Bay etc. Canal Co.*, 31 Id. 339. And it is overruled upon the point that a judgment will not be reversed when the plaintiff is entitled to merely nominal damages, though the court directed the jury to find for the defendant, on the ground that a judgment for nominal damages carries costs, since such an action could not be brought in the justice's court: *Baton v. Lyman*, 30 Id. 46; *Jones v. King*, 33 Id. 425.

RICH v. ZEILSDORFF.

[22 WISCONSIN, 544.]

EXCEPTION IN CONVEYANCE IS PART OF THING GRANTED AND OF THING IN BEING; while a reservation is of a thing not in being, — is not a part of the estate itself, but is created out of it.

TIMBER REMAINS PROPERTY OF GRANTOR, WITH RIGHT IN SO MUCH OF SOIL as is necessary to sustain it, when the timber itself is excepted in the conveyance.

RESERVATION IN DEED OF RIGHT TO CUT AND REMOVE SO MUCH TIMBER as the grantor may remove within a specified period does not except out of the estate granted the ownership of the timber, but reserves to the grantor a mere right of cutting and removing, which terminates at the expiration of the period of limitation; and this is the legal effect of a clause in a deed "reserving the right to cut and remove all the pine timber or trees upon said premises, etc., and the right is hereby reserved by [the grantor] to enter upon said lands at any time within two years next succeeding the date of this instrument for the purpose of cutting and removing the trees and timber so reserved."

REPLEVIN for logs. The plaintiff conveyed land to the defendant, and in the deed inserted a clause recited in the opinion, reserving to himself the right to cut and remove timber, etc. During the two years' period of limitation expressed in the reservation, he cut and removed a part of the timber, and left upon the land 125 logs cut, and a large amount of timber standing. He testified that, before the expiration of the two years, the defendant agreed to extend the time for a year or more; and that afterwards, and within the three years when he commenced cutting timber on the land, the defend-

ant forbade him to cut or remove any more. The defendant denied that he ever gave an extension of time. The action was brought to recover the logs already cut, but not removed from the land. The court instructed that the clause in the deed was to be treated as an exception, and that the absolute title to the timber remained in the plaintiff; that if the logs in question were a part of this timber, and the defendant, on demand, refused to deliver them, the plaintiff was entitled to recover; that a parol license to enter and take off the timber after the expiration of the two years would be good, and would protect the plaintiff against the charge of trespass; and that the defendant might have given notice to the plaintiff after the two years expired to remove the timber, and plaintiff would have had a reasonable time to remove the same without being liable for damage. The verdict was for the plaintiff, and a new trial being denied, the defendant appealed from a judgment on the verdict.

Hudd and Wigman, for the appellant.

Myron Reed, for the respondent.

By Court, COLE, J. This case must turn entirely upon the construction which is placed upon a clause in the deed of warranty, dated March 13, 1863, given by the plaintiff as grantor to the defendant as grantee. The deed was for the consideration of \$225, and conveyed "all that certain piece or parcel of land situated, lying, and being, . . . reserving the right to cut and remove all the pine timber or trees upon said premises, and one half of all cedar trees upon said premises; and the right is hereby reserved by the party of the first part to enter upon said lands at any time within two years next succeeding the date of this instrument, for the purpose of cutting and removing the trees or timber so reserved."

The question now is, Did the grantor by this language reserve only the right to cut and remove so much of the timber upon the land conveyed as he might cut and remove within two years from the date of the deed? Or did he reserve to himself the absolute ownership of the timber, and merely fix or limit the time it would be lawful for him to enter upon the premises for the purpose of taking off the timber so reserved? The defendant contended that the former construction was the proper one to be placed upon the clause of the deed just cited, and accordingly asked the circuit court to in-

struct the jury that the conveyance conveyed an estate in fee to the defendant, with the right of plaintiff to cut and remove all the pine timber thereon, and one half of the cedar, within two years from the date of the deed; and that if not cut and removed within that time, the reservation or exception lapsed, and the estate became absolute in the defendant. The court refused to give this instruction, but charged the jury, among other things, that the clause in the deed in terms reserving the pine and half of the cedar timber on the land conveyed is to be treated as an exception, and the absolute title of the timber remained in the plaintiff. Was this construction of the deed by the court correct?

Judge Selden, in *Craig v. Wells*, 11 N. Y. 315-321, in speaking of the distinction between an exception and a reservation in a conveyance, says: "Although these terms are frequently used as substantially synonymous, yet they are in reality different. Perhaps the difference cannot be better stated than in the words of Shepard. He says: 'A reservation is a clause in a deed, whereby the grantor doth reserve some new thing to himself out of that which he granted before. This doth differ from an exception, which is ever a part of the thing granted, and of a thing *in esse* at the time; but this is of a thing newly created or reserved out of a thing demised that was not *in esse* before': Shep. Touch. 80. It will be seen, therefore, that a reservation is always of something taken back out of that which is clearly granted, while an exception is some part of the estate not granted at all. A reservation is never of any part of the estate itself, but of something issuing out of it, as, for instance, rent, or some right to be exercised in relation to the estate, as to cut timber upon it. An exception, on the other hand, must be a portion of the thing granted, or described as granted, and can be of nothing else; and must also be of something which can be enjoyed separately from the thing granted: Shep. Touch. 77, 78; *Cunningham v. Knight*, 1 Barb. 399; *Starr v. Child*, 5 Denio, 599."

Substantially the same language is used by Chief Justice Tenney, in *State v. Wilson*, 42 Me. 9-21, where he says: "Exception is always a part of a thing granted, and of a thing in being; and a reservation is of a thing not in being, but is merely created out of lands and tenements devised; though exception and reservation have often been used promiscuously."

In giving a construction to this clause of the deed, we must

ascertain, if possible, the intention of the parties to the instrument. And we think that the intention manifestly was to reserve only the right to cut and remove so much of the timber upon the land conveyed as the grantor might remove within two years from the date of the deed. It will be noticed that the reservation is of the right to cut and remove the timber upon the land,—that is, a new right derived from the estate granted, and hence it falls fully within the definition of a reservation above given. For when the land was conveyed, and this right to cut and remove the timber was reserved, that right, in the sense of the law, became a new thing, separate from the right of the grantee in the premises. In some of the cases, the timber itself is reserved, and the courts hold that this is strictly an exception, since it is a part of the realty, or a part of the estate, and would have passed to the grantee but for the exception. The property in the timber continues in the grantor, with the right in so much of the soil as is necessary to sustain it. That was the language of the grant in *Howard v. Lincoln*, 13 Me. 122; *Goodwin v. Hubbard*, 47 Id. 595; and *Knotts v. Hydrick*, 12 Rich. 314, where it was held that the timber remained the property of the grantor. In *Sanborn v. Hoyt*, 24 Me. 118, where a tract of land was conveyed, “excepting and reserving all the buildings on said premises,” the court held that the whole land described in the deed, including that under the buildings, passed to the grantees, but that the buildings became the personal property of the grantors. But those cases are readily distinguishable from the one we have before us. Here it is not the timber which is excepted from the operation of the deed, but the right to cut and remove only so much as he may take off within the time specified in the deed. It comes fully within the principle of the cases of *Pease v. Gibson*, 6 Me. 81, and *Reed v. Merrifield*, 10 Met. 155.

But it is said if it was the intention of the parties merely to reserve to the grantor the right to go upon the land and take off the timber standing thereon for two years, then the last clause of the reservation is wholly unnecessary. But this is a mistake. The proper office of that clause was to fix the time within which the grantor must exercise the right reserved. In the first clause of the reservation no time was specified. But the parties provided by the subsequent language that the right to cut and remove the timber might be exercised for the period of two years, after the expiration of which time the right lapsed.

But further, it is said that within the two years, the time limited for removing the timber, the defendant agreed that the plaintiff might get the timber off the next winter, or whenever he chose, and therefore that the defendant is now estopped from insisting that the right is lapsed. It is claimed that the doctrine of estoppel *in pais* applies to the case. But the defendant testified that he never gave a longer time than two years. Now, assuming that such an agreement would be valid as a parol license,—a point we do not decide,—still it is obvious that whether an agreement of this kind was made or not was a proper question to be submitted to the jury upon the evidence. In the present attitude of the cause, we certainly cannot determine whether the license would be irrevocable, or prevent the right to remove the timber from terminating or not. The jury must find, under proper instructions, that such a license existed, and the terms of such license, before this question can arise. We think the court erred in refusing to give the instructions asked by the defendant, and in giving the one already noticed.

The judgment of the circuit court is reversed, and a new trial awarded.

RESERVATION OF TIMBER IN DEED INCLUDES WHAT: See *Alcott v. Lakin*, 66 Am. Dec. 739. A reservation will continue for the time limited: *Farnum v. Platt*, 19 Id. 330. The principal case is approved and followed in *Martin v. Gileson*, 37 Wis. 362, in which case the deed "reserved" to the plaintiff, "his heirs, and assigns, the right to cut and remove all the pine, white oak, and bass wood, and one half the red oak, from said land, at any time before" a day named; and it was held that as the deed did not except the wood from the grant, but merely reserved the right to cut it, the plaintiff could not maintain trover for the timber cut by his grantee upon the land before the expiration of the time limited: See also *Strasson v. Montgomery*, 32 Wis. 58; *Sawyer v. Hanson*, 48 Id. 614.

KUTZ v. McCUNE.

[22 WISCONSIN, 623.]

EXISTENCE OF EASEMENT OBVIOUSLY AND NOTORIOUSLY AFFECTING PHYSICAL CONDITION OF LAND at the time of its sale, such as a right of flowing the land by a mill-pond in actual existence upon it, does not constitute a breach of a general covenant against encumbrances.

.ACTION for breach of covenants of seisin and against encumbrances. The opinion states the case.

L. B. Caswell, for the appellant.

I. W. and G. W. Bird, for the respondent.

By Court, PAINE, J. The defendant conveyed to the plaintiff a tract of land by a deed containing the usual covenants of seisin and against encumbrances, without any exceptions to those covenants. At the time of the purchase, between thirty and forty acres of the land were flowed by a mill-pond created by a dam on land not belonging to the defendant, which dam had been maintained long enough to create a prescriptive right in the owner of it to flow the land in question. This action was brought for a breach of the covenants of seisin and against encumbrances, by reason of this existing right of flowing.

The circuit court instructed the jury that it made no difference whether the purchaser was fully aware of the situation of the property at the time of purchasing, or not; and that the right of flowing constituted an encumbrance that occasioned a breach of the covenant, for which the defendant was liable. This, I think, was error. That such a right does not constitute a breach of the covenant of seisin, see *Rawle on Covenants*, 83, 142. It may have been an encumbrance. But there is a principle recognized by adjudged cases, and resting upon sound reason and policy, which holds that purchasers of property obviously and notoriously subjected at the time to some right of easement or servitude affecting its physical condition, take it subject to such right without any express exceptions in the conveyance, and that the vendors are not liable on their covenants by reason of its existence. This principle has been applied in the case of a highway opened and in use upon the land at the time of the conveyance: *Rawle on Covenants*, 141 et seq.; *Scribner v. Holmes*, 16 Ind. 142.

This principle seems fully applicable to the present case. There is no material difference, so far as this question is concerned, between a public highway and a right of flowing the land by a mill-pond in actual existence upon it. In the case of the highway, the doctrine does not rest upon the fact that the right is in favor of the public, but that the easement is obvious and notorious in its character, and that therefore the purchaser must be presumed to have seen it, and to have fixed his price for the land with reference to its actual condition at the time. And certainly a mill-pond upon land is quite as notorious an object as a highway, and the reason for the pre-

sumption just suggested is quite as strong. The contrary doctrine has been held, in respect to highways, in Massachusetts and some of the other New England states; though in *Herrick v. Moore*, 19 Me. 313, the court seem to apply that if the highway had been actually opened and in use, and the plaintiff knew of its existence at the time of his purchase, their conclusion would have been different. But however that might have been, the weight of the argument is decidedly in favor of the rule held in Pennsylvania in *Patterson v. Arthurs*, 9 Watts, 152, and approved in *Whitbeck v. Cooke*, 15 Johns. 483 [8 Am. Dec. 272]. And to hold that every highway, in open notorious use as such, upon land at the time of its conveyance, would constitute a ground of action for a breach of the covenant against encumbrances, unless specially excepted, would undoubtedly, in the language of Chief Justice Spencer, "open a floodgate of litigation" in this state as well as in New York.

There is another class of cases which strongly support the same conclusion. The principle which they establish may be briefly stated in the language of the *syllabus* to *Seymour v. Lewis*, 13 N. J. Eq. 439 [78 Am. Dec. 180], as follows: "Where the owner of two tenements sells one of them, the purchaser takes the tenement or portion sold with all the benefits and burdens which appear at the time of the sale to belong to it, as between it and the property which the vendor retains." The case cites a great number of authorities illustrating the rule. It was also in accordance with the French law, as shown in Washburn on Easements, 16, 17. And a very strong instance of its enforcement is found in the recent case of *Harwood v. Benton*, 32 Vt. 724. That was a case where the owner of a mill-pond and the surrounding lands conveyed a lot not bounded on the pond, but adjacent to it, and which was sometimes flowed, though not continuously. The deed contained the usual covenants, with no exception or reservation. Yet the court held that the vendor himself retained the right to flow the lot conveyed as it had been theretofore flowed, and was not liable on his covenants by reason of the existence of such right. According to that case, if the defendant here had himself owned the mill and dam which created the mill-pond, he would have retained the right to flow the land as it was flowed, and would not have been liable on the covenants. Can there be any stronger reason for holding him liable now? If the law, without any exception in the deed, will, from the presumed understanding of the parties, based upon the obvious

condition of the property sold, imply a reservation in favor of the vendor, should it not equally imply one upon the same grounds when the continued existence of the right is of no benefit to the vendor?

True, there is a technical difference, which is alluded to in the case last cited. That is, that where both parcels of land are owned by the same person, the servitude imposed on a part in favor of the rest is not technically an easement, because no man can have an easement in his own land. But the implied reservation in his favor takes effect at the same instant with his covenants on the delivery of the deed, and then constitutes an easement in his favor, and consequently an encumbrance. And certainly there is no more ground for supposing that the purchaser in such case intends to take the property subject to such reserved right in favor of his vendor than there is, in the case where the property in whose favor the servitude is imposed is owned by a stranger, to suppose that he intended to take it subject to that. This class of decisions does not rest at all upon this technicality, but upon the broad, substantial grounds constituting the foundation of the former class. And the court in Vermont quotes from Gale and Whateley on Easements the following passage, which puts the vendor only on the same footing in this respect with other adjoining owners: "There is no reason why a purchaser should not exercise the same degree of caution in ascertaining what easements his projected purchase is liable to in favor of his vendor as well as in favor of other adjoining owners." The substantial foundation for both classes of decisions is the strong, natural presumption that the parties sell on the one hand, and buy on the other, the property in its actual physical condition, and subject to such rights, either in favor of the vendor or others, as that physical condition obviously indicates, without any exceptions or reservations concerning them in the deed. So that the decisions that an existing highway in favor of the public, and a right of flowing the land conveyed by the vendor, as it was done at the time of the conveyance, do not constitute breaches of the covenant against encumbrances for which the vendor is liable, really rest upon the same principle.

The court below compared it to the case of a mortgage on the property sold known to the purchaser. But the two cases are essentially different. A mortgage does not affect the physical condition of the property at all. It is a mere incident to a debt of the vendor; and where the purchaser takes

his covenant against encumbrances, there is no reasonable ground for supposing that he intended to have his land subsequently sold to pay the vendor's debt, or else to pay it himself. It is so different from the question that has been considered that there is really no comparison between them.

The judgment is reversed, and the cause remanded for a new trial.

RIGHT TO USE OF WATER BELOW CERTAIN GRANTED PREMISES, in accordance with an appropriation previously made, is not an encumbrance within the meaning of a covenant against encumbrances, but a parcel of such lower estate: *Cory v. Daniels*, 41 Am. Dec. 532.

WHERE LAND IS SOLD UPON WHICH THERE IS OBVIOUS EXISTING EASEMENT OR BURDEN of any kind, like an ordinary highway, a railroad, or mill-pond, the fair presumption, in the absence of any express provision in the contract upon the subject, is, that both parties act with direct reference to the apparent existing burden, and that the vendor demands and the purchaser pays only the value of the land subject to it. This presumption is independent of the question whether the party enjoying the easement has perfected his title as against the vendor or not. Nothing being said upon the subject, they deal with the property in its existing condition, and upon the assumption that it is subject to all the burdens to which it appears to be subject: *Pomeroy v. Chicago etc. R. R. Co.*, 25 Wis. 644; *Pick v. Rubicon Hydraulic Co.*, 27 Id. 443. And such easements do not constitute a breach of covenants against encumbrances: *Smith v. Hughes*, 50 Id. 627; *Burbach v. Schweinler*, 56 Id. 390. But in Indiana the rule is different: *Burk v. Hill*, 48 Ind. 58. On the other hand, a prior valid deed to a railroad company and its assigns of a strip of land along the line of its railroad for the uses and purposes of said company is a breach of the covenant of seisin in a subsequent deed, by the same grantor to a third person, of a parcel of land which includes such strip, although the company is in occupancy of the strip for the purposes of a railroad when such subsequent deed is executed: *Messer v. Oestreich*, 52 Wis. 693, distinguishing the principal case, and *Smith v. Hughes*, 50 Id. 620, on the ground that in these cases there was no outstanding title which had been created by the deed of the covenantor or any of his grantors. It has been held in Wisconsin that the vendor, and not the vendee, of lands flowed by a mill-dam at the time of the sale, is entitled to the damages for the perpetual flowage of such lands, and that the vendee can recover only damages caused by any increase in the height of the dam subsequent to his purchase: *Mead v. Hein*, 28 Id. 538; *Pick v. Rubicon Hydraulic Co.*, 27 Id. 433. These cases, however, are overruled in *Sabine v. Johnson*, 35 Id. 201, 202, but it is expressly stated that there is no intention to disturb the rulings in the principal case, and in *Pomeroy v. Chicago etc. R. R. Co.*, 25 Id. 641. The above cases all cite the principal case.

GRIFFITH v. SMITH.

[22 WISCONSIN, 646.]

REPLEVIN WILL NOT LIE AGAINST SHERIFF FOR SPECIFIC CHATTELS in his custody under a lawful writ commanding him to seize and hold that identical property.

REPLEVIN for pine logs in the custody of the sheriff under a writ of attachment issued in a proceeding to enforce a lien for labor performed in getting out the logs. The plaintiff had purchased the logs from the owners, and sought to gain possession of them by this proceeding. He testified that before he paid for them he asked the lien claimant if he had any lien on them, and he replied that he had not. And it also appeared that the verification of the petition for the lien and of the complaint to enforce the lien was made by the attorney of the claimant, upon information given him by one of the owners of the logs, the claimant at the time being out of the county. The court charged that the sheriff was protected by his writ, and that replevin would not lie. Verdict and judgment for the defendant, and appeal by the plaintiff.

C. Coolbaugh, for the appellant.

Felker and Weisbrod, for the respondent.

By Court, PAINE, J. This was an action to recover possession of a quantity of logs. The defendant held them as sheriff, having seized them by virtue of a writ of attachment issued in a proceeding to enforce a lien for labor in getting out the logs. The writ, in such a case, commands the officer to seize and hold the identical property which is claimed to be subject to the lien. The case falls, therefore, precisely within the principle established in *Watkins v. Page*, 2 Wis. 98, and reaffirmed in *Weinberg v. Conover*, 4 Id. 803. Those cases held that, upon the facts here presented, the officer was not liable to an action of replevin. And whatever might be the opinion of the court as now constituted upon the question, were it a new one, we shall not now attempt to re-examine a question that has been so long decided. The counsel for the appellant alleges that there was collusion between the parties to the lien proceeding, and there is some evidence indicating that such might have been the fact. And if the question could be gone into in this action, it is possible that the right of the plaintiff might have prevailed against the attachment. But it being once determined that the officer is not liable to

the action for doing what a legal writ specially commanded him to do, it is useless to suggest or inquire what the merits might have been in case the action could have been sustained. What may be the remedy of a party situated as the plaintiff claims to be is not so obvious that we feel called on to make any suggestions in regard to it in advance of a necessity for doing so.

The judgment must be affirmed.

Judgment affirmed.

REPLEVIN WILL NOT LIE FOR PROPERTY HELD BY OFFICER UNDER LEGAL PROCESS: *Hagan v. Devell*, 88 Am. Dec. 769, and note 773; *Willard v. Kimball*, 87 Id. 632, and note 634. The principal case is cited to the point that if the sheriff has a legal writ which commands him to seize the identical property in question, he will be fully protected, unless he acted wrongfully in executing it: *Gerber v. Ackley*, 37 Wis. 45; and that replevin will not lie against an officer to recover chattels which he has taken under an attachment in a lien proceeding: *Battis v. Hamlin*, 22 Id. 675; *Union Lumbering Co. v. Tromson*, 36 Id. 128; *Gross v. Eiden*, 53 Id. 547.

THE PRINCIPAL CASE IS CITED also to the point that a sale under a judgment to enforce a laborer's lien, though rendered in an action to which the real owner of the property is not a party, and of which he has no actual notice, conveys a legal title to the purchaser, and bars the real owner at law: *Winslow v. Urquhart*, 44 Wis. 200.

DREHER v. TOWN OF FITCHBURG.

[22 WISCONSIN, 675.]

SLIGHT NEGLIGENCE IS MERELY ABSENCE OF THAT DEGREE OF CARE AND VIGILANCE which persons of extraordinary prudence and foresight are accustomed to use.

SLIGHT NEGLIGENCE CONTRIBUTING DIRECTLY TO INJURY WILL NOT PREVENT RECOVERY.

WANT OF ORDINARY CARE CONTRIBUTING DIRECTLY TO INJURY WILL PREVENT RECOVERY.

ORDINARY NEGLIGENCE IS WANT OF SUCH CARE AS PERSONS OF ORDINARY PRUDENCE or the mass of mankind observe.

TOWN IS LIABLE FOR INJURY CAUSED BY DEFECTIVE HIGHWAY, though the injury was in part caused by a defect in the axle of plaintiff's vehicle, provided the accident would not have occurred except for the defect in the highway.

EXCLUSION OF EVIDENCE IS NOT GROUND FOR REVERSAL, unless, when it is offered, its object is stated with sufficient distinctness to enable the appellate court to see that material evidence was rejected, or unless a sufficient foundation for it is shown in the evidence already introduced.

ADMISSIONS ARE WEAKEST KIND OF EVIDENCE, and an instruction to this effect is not erroneous. But this does not imply that an admission deliberately made and clearly proved beyond mistake would not have very great inherent force as evidence.

ACTION for damages for injuries suffered because of a defect in a highway upon which the plaintiff was driving a team attached to a separator. Verdict and judgment for the plaintiff, and appeal by the defendant. The opinion states the case.

Gregory and Pinney, for the appellant.

W. F. Vilas, for the respondent.

By Court, PAINE, J. It is claimed that the circuit court erred in refusing to instruct the jury, as requested by the defendant, that "slight negligence" on the part of the plaintiff, which contributed directly to the injury, would prevent a recovery. This would have been error if the words "slight negligence" are to be construed as equivalent to a slight want of ordinary care and prudence. But such is not the case. On the contrary, negligence has long been divided into three degrees—slight, ordinary, and gross. This division has sometimes been criticised, like everything else, but it is well established, and seems based upon sound reason, and capable of practical, intelligent application by the ordinary juries of the country; and in accordance with it, slight negligence is defined to be only an absence of that degree of care and vigilance which persons of extraordinary prudence and foresight are accustomed to use. To have given the instruction as drawn would therefore have been equivalent to telling the jury that such a want of care on the part of the plaintiff, which contributed directly to the injury, would have prevented a recovery. But such is not the law. To require of the mass of mankind that extreme degree of care which only persons of extraordinary prudence possess would be to require an impossibility. It would be to deliver them up to injury by the negligence, carelessness, and recklessness of others, without redress. The counsel for the appellant would not contend for such a rule. And the authorities cited by him only go to show that if there is any want of ordinary care on the part of the plaintiff, contributing directly to the injury, then the law will not attempt to measure the degree of such negligence, but will forbid a recovery. Such is the case of *Walker v. Westfield*, 39 Vt. 246. The language of the opinion on page 253, quoted by counsel, clearly relates, as appears by that portion of the opinion immediately preceding it, to a want of "such care as persons ordinarily exercise for the purposes of such a journey." It is only the want of such

care that the law imputes to plaintiffs as a fault. And that proposition being first distinctly announced, courts frequently proceed to say that a slight want of such care defeats a recovery. But it would by no means be proper to infer from this that it would be correct to instruct a jury that slight negligence would defeat a recovery, as an abstract proposition. For in that form it would mean that an absence only of that extreme care which persons of great prudence and caution use would prevent a recovery, when it is quite obvious that an absence of such care is entirely consistent with the exercise of such care and prudence as persons ordinarily exercise, and which is all that the law requires. It is evident that such was the view of the circuit judge in refusing the instruction, because in another part of his charge he defined slight negligence substantially as defined above, and he repeatedly instructed them that if any want of ordinary care in the plaintiff contributed to the injury directly he could not recover. There was no error in the refusal.

The appellant excepted to the definition given by the court below of ordinary care and ordinary negligence. The definition was as follows: "Then there is ordinary negligence, or a want of ordinary care. This is the want of such care as persons of ordinary care and prudence observe in and about their affairs. I may say in this connection that it is the want of such care as the great mass of mankind, or the majority of mankind, observe in the transactions of human life." We see no ground for any exception to this definition.

It was also urged by the counsel for the defendant that the accident occurred partly on account of a defect in the axle of the separator; and he asked for several instructions to the effect that if such accident, or any other cause besides the negligence of the town, contributed to the injury, the town would not be liable. The judge refused so to instruct, but told the jury that the plaintiff might recover notwithstanding such other cause contributed to the injury, unless such other cause was attributable to some want of ordinary care on the part of the plaintiff, provided they found that the accident would not have occurred except for the defect in the highway. This is the substance of his instructions upon the point, repeated in different forms in different portions of the charge, to which the defendant excepted.

In support of these exceptions, the appellant's counsel cites the following cases: *Moore v. Abbot*, 32 Me. 46; *Farrar v.*

Greene, 32 Id. 574; *Coombs v. Topsham*, 38 Id. 204; *Anderson v. Bath*, 42 Id. 346; *Ingalls v. Bills*, 9 Met. 1 [43 Am. Dec. 346]; and *Prindle v. Fletcher*, 39 Vt. 255. The last two of these cases seem to have no bearing upon the question. The case in Metcalf decides that common carriers of passengers were not liable for an injury happening through a latent defect in an axle of a coach, which no care or foresight could have discovered. The case in Vermont decides that a town is not liable for an injury occasioned by a similar defect in a highway. But neither of them presented the question whether, where an injury is occasioned by the negligence of the defendant, a recovery will be prevented, provided some accident or other cause, without fault on the part of the plaintiff, contributed to the injury. The cases in Maine seem to support the appellant's position. But the following cases sustain the opposite conclusion, holding the law to be as declared by the circuit judge: *Hunt v. Pownall*, 9 Vt. 411; *Kelsey v. Glover*, 15 Id. 708; *Allen v. Hancock*, 16 Id. 230; *Palmer v. Andover*, 2 Cush. 600; *Bigelow v. Rutland*, 4 Id. 247; *Clark v. Barrington*, 41 N. H. 44; *Winship v. Enfield*, 42 Id. 197.

The conclusion of these cases seems to us founded in better reason and sounder views of public policy than the one sustained by the opposite decisions. And we shall hold, accordingly, that there was no error in the ruling of the circuit judge upon this question.

The counsel for the defendant, on the trial, asked the witness Kyser "what he knew about the team, and how they appeared and acted." This was objected to, but upon what ground is not stated. The objection was sustained, and an exception taken. It is claimed that the object was to prove the team to have been an improper and unsafe one. But if so, the offer was not made with sufficient distinctness to enable us to see that any material evidence upon that point was rejected. It was not shown that the witness had any knowledge of the team prior to the accident. There was no offer to show that he had. The time to which the question as to the appearance of the team related is not indicated. He may have seen them immediately after the accident, when they were first caught. And it could hardly be claimed that their appearance at that time would throw any light on their previous character or habits. It is true that material evidence might have been given in answer to the question. But it is equally true that it might have been wholly immaterial. And

a party alleging error must show, either by a sufficient foundation in the evidence already introduced or by stating his offer in a distinct form, that material evidence was excluded, before an appellate court can reverse for excluding evidence. It is not sufficient that it might have been.

It is further claimed that the court erred in telling the jury that admissions of a party were "the weakest kind of evidence that could be produced." But this language is not materially different from that generally used in elementary works and by courts in regard to this class of evidence. Greenleaf, in his work on evidence, volume 1, section 200, says it should be "received with great caution," and that it is "subject to much imperfection and mistake." Judge Redfield, in his edition of that work, in continuation of the same paragraph, after alluding to the various reasons which create a probability of error in this kind of evidence, says: "We must conclude there is no substantial reliance upon this class of testimony." It has often been characterized as the "most unsatisfactory," "the most dangerous," of all evidence. And it does not seem materially different to say it is the "weakest kind of evidence." This does not imply that an admission deliberately made, and clearly proved beyond mistake, would not have very great inherent force as evidence. But the weakness of this testimony consists in the uncertainty and liability to mistake on these preliminary questions.

On the whole, we find no error in the case. The charge may be liable to the criticism of having attempted to make the matter very plain by too much explanation. But its legal propositions are correct, and there is nothing that would seem liable to mislead the jury.

The judgment is affirmed, with costs.

WANT OF ORDINARY CARE, CONTRIBUTING DIRECTLY TO INJURY, WILL BAR RECOVERY: See *Northern Central R'y Co. v. State*, 96 Am. Dec. 545, and note 553, 554.

SLIGHT NEGLIGENCE AS BAR TO RECOVERY: See *Potter v. Chicago etc. R'y Co.*, 94 Am. Dec. 548, and note 551. The principal case is cited to the point that slight negligence on the part of the plaintiff will not prevent recovery; but "it is only the want of ordinary care and prudence, under the circumstances, to avoid the injury which the law imputes to the plaintiff as a fault contributing to it, and which will bar his remedy": *Ward v. Milwaukee etc. R'y Co.*, 29 Wis. 148; *Houfe v. Town of Fulton*, 29 Id. 302; *Cremer v. Town of Portland*, 36 Id. 100; *Griffin v. Town of Willow*, 43 Id. 512; *Hammond v. Town of Mukwa*, 40 Id. 42. And slight negligence is not slight want of ordinary care contributing to the injury which would defeat an action for negligence.

Slight negligence is defined to be only an absence of that degree of care and vigilance which persons of extraordinary prudence and foresight are accustomed to use: *Griffin v. Town of Willow*, 43 Wis. 512; *Cramer v. Town of Portland*, 36 Id. 100; *Hammond v. Town of Mukwa*, 40 Id. 42. And therefore it is improper to instruct the jury that if anything else than the negligence of the defendant contributed to the injury the plaintiff cannot recover: *Sheff v. City of Huntington*, 16 W. Va. 321.

ORDINARY CARE IS SUCH CARE AS GREAT MAJORITY OF MANKIND OBSERVE in the transactions of human life: *Neenow v. Uttech*, 48 Wis. 590, citing the principal case; see *Deahler v. Beers*, 83 Am. Dec. 274; *Scott v. Hunter*, 84 Id. 542, and note 547; *Butterfield v. Western R. R. Corp.*, 87 Id. 678, and note 682. And negligence is the absence of care, according to the circumstances: *Frankford T. Co. v. Philadelphia R. R. Co.*, 93 Id. 708. And as it must in every case depend for the most part upon the circumstances, actionable negligence is said by some authorities to be undefinable: *McDonald v. Chicago etc. R. R. Co.*, 96 Am. Dec. 114, and note 124. The principal case is cited to the point that slight want of ordinary care which contributes to the injury will defeat the plaintiff's action, no matter how gross the negligence on the part of the defendant, unless such negligence be so gross that the court and jury might infer that the act of the defendant was willful or malicious: *Randall v. Northwestern Telegraph Co.*, 54 Wis. 149; *Prideaux v. City of Mineral Point*, 43 Id. 525.

LIABILITY OF MUNICIPAL CORPORATIONS FOR DEFECTIVE HIGHWAYS: See *Mayor etc. of Savannah v. Cullens*, 75 Am. Dec. 398, and note 400.

ADMISSIONS AS EVIDENCE: See *Diversey v. Kellogg*, 92 Am. Dec. 154, and note 159; *Morehouse v. Northrop*, 89 Id. 211.

ERRORS IN ADMISSION OR EXCLUSION OF EVIDENCE will not be noticed, unless the grounds thereof appear on the record: See *Briggs v. McCabe*, 89 Am. Dec. 503, and note 506; *Childs v. McChesney*, 89 Id. 545, and note 549.

KELLOGG v. FANCHER.

[28 WISCONSIN, 21.]

ONE WHO TAKES NEGOTIABLE NOTE IN EXTINGUISHMENT OF ANTECEDENT INDEBTEDNESS IS HOLDER THEREOF FOR VALUE.

BONA FIDE HOLDER OF NEGOTIABLE NOTE FOR VALUE, WHO IS, AND WHEN PROTECTED. — Where A gave his individual note, for his private debt, to B, and B took in payment thereof notes of third persons running to A, but which were in fact the property of a copartnership of which A is a member, B will be protected as a *bona fide* holder for value, if he was ignorant of the existence of such copartnership.

DOCTRINE OF LIS PENDENS AS APPLIED TO COMMERCIAL PAPER NOT DUE AND PAST DUE. — Persons not having actual notice are not bound to take notice of any pending suit affecting commercial paper not due; but it is otherwise as to such paper past due.

RULES STATED AS TO WHEN LIS PENDENS BEGINS UNDER ENGLISH LAW.

PERSONS ARE NOT CHARGEABLE WITH CONSTRUCTIVE NOTICE OF ACTION AFTER SERVICE OF SUMMONS AND COMPLAINT and accompanying papers, but before any papers have been filed; nor will the subsequent filing ren-

der them chargeable from the time of such service, upon the doctrine of relation. In this case, where an injunctional order was served with the summons and complaint, the above rule was applied.

ACTION by L. S. Kellogg against J. H. Fancher, E. H. Kellogg, and Starkweather. The Kelloggs and Fancher were partners, doing a mercantile business under the firm name of James H. Fancher. They became insolvent, sold their stock in trade, and received notes in payment therefor. It was alleged that the claims of the firm against customers were in the hands or under the control of Fancher, who, without plaintiffs' knowledge or consent, about October 11, 1861, placed in Starkweather's possession notes and accounts of the firm to the amount of two thousand dollars for Starkweather to collect, and to pay out of the proceeds certain notes given by Fancher on his private account to M. B. Miller and Rachel Miller, amounting to fourteen hundred dollars; and that such a diversion would further cripple the assets of the firm to that extent. Plaintiff therefore brought this action in his own name and those of any creditors who might choose to come in, etc., to restrain the defendants from selling, collecting, etc., any property, claims, or demands of said firm. The appointment of a receiver, an accounting, and general relief were also asked for. The summons and complaint, and an injunctional order founded thereon, were served on each of the above-named defendants on November 6, 1861. On November 11, 1861, the complaint was amended, and M. B. and Rachel Miller, Farr, Moore, and West were made defendants, and the summons, complaint, and injunctional order served on them. It was further alleged in the amended complaint that, after November 1, 1861, Fancher placed in the hands of Miller and wife the notes mentioned in the opinion, which belonged to the firm of James H. Fancher; that Miller and wife claimed to apply them on a previously existing demand they had against Fancher individually, and that neither of them had advanced to Fancher any value therefor. The same relief was sought against the Millers as against the other defendants, and there was a further prayer that Farr, Moore, and West might be restrained from paying their notes above mentioned to any person except the receiver to be appointed herein; and that if the Millers had collected or transferred said notes, they should be adjudged to pay the value thereof into court, etc. Subsequently, various creditors of the firm of James H. Fancher became parties plaintiff. The cir-

cuit court decreed an accounting between the partners, the appointment of a receiver, and that the injunction should be continued in force as to Fancher and E. H. Kellogg; but it found that the Millers were *bona fide* holders of said notes for a valuable consideration, and ordered that the injunction be dissolved, and the action dismissed as to them and all the other defendants, except the two above named. The plaintiffs appealed from the latter part of the judgment. The defense of the Millers appears in the opinion.

J. J. Pettit, for the appellants.

O. S. and F. H. Head, for the respondents.

By Court, DOWNER, J. This action was commenced on the sixth day of November, 1861, in the Racine circuit court, by the service of the summons, injunction order, and complaint on the defendant Fancher. Some two or three days after, Fancher, at Elkhorn, in Walworth County, sold and transferred to Miller and wife three notes,—two for four hundred dollars each, then past due, against one West, and one for five hundred dollars, not due, made by Farr and Moore,—all the notes being partnership property. The partnership between Fancher and the Kelloggs was carried on in the name of Fancher. Miller and his wife gave for the notes transferred to them by Fancher notes held by them, or one of them, against him, amounting to about the same sum. Miller and his wife testify, in substance, that the consideration of the notes they held against Fancher was money loaned to Fancher by his sister, Mrs. Miller, before her marriage, and interest thereon. They testify that they had no knowledge at the time they purchased the notes of Fancher of the pendency of this action, or that Fancher had any partners; and they claim the protection which innocent purchasers for a valuable consideration are entitled to. They took the notes transferred to them in payment of an antecedent indebtedness. There is some conflict of authorities as to whether such purchasers can be *bona fide* purchasers. We think, however, that the weight of authority is, that the extinguishment or payment of an antecedent indebtedness is as good and valuable a consideration as the payment of money. We see nothing to impeach the testimony of Miller and wife, and must take their testimony as true. We hold, therefore, that they are entitled to protection against the claim or lien of the partners of Fancher, and against the credi-

tors of the firm, unless the pendency of the action was a constructive notice to them, or the policy of the law is such that they must, by reason of the *lis pendens*, hold their title to the notes, subject to the claims of the plaintiff and the judgment in the action.

Are Miller and wife affected with notice of this action? or can its pendency in any way affect their title to the notes in question? The doctrine of *lis pendens*, in its application to real estate, was described by Chancellor Kent in *Murray v. Ballou*, 1 Johns. Ch. 566. He says: "The established rule is, that a *lis pendens*, duly prosecuted, and not collusive, is notice to a purchaser so as to affect and bind his interest by the decree; and that the *lis pendens* begins from the service of the subpoena after the bill is filed." He adds: "That it is no more than the adoption of the rule in a real action at common law, where, if the defendant aliens after the pendency of the writ, the judgment in such real action will overreach such alienation."

In *Murray v. Lyburn*, 2 Johns. Ch. 441, the principles asserted in *Murray v. Ballou*, *supra*, were held to apply to choses in action. In *Diamond v. Lawrence County*, 37 Pa. St. 358 [78 Am. Dec. 429] (where nearly all the authorities on this point are cited), the court held that the pendency of a suit between a county and a railroad company, in regard to bonds issued by the county in payment of its subscription to the stock of the company, is notice to all the world of the facts alleged in the pleadings therein; and that the purchasers of such bonds from the company, and all subsequent purchasers, were affected by the decree of the court in the suit pending at the time of the purchase. The court held, however, that the bonds were not commercial paper; and it is very evident from the opinion that they would not apply the doctrine of *lis pendens* to bills of exchange or promissory notes negotiable according to the law merchant, and not due at the time of transfer. Chancellor Kent also, in *Murray v. Lyburn*, *supra*, expressed a doubt whether the rule of *lis pendens* was to be carried so far as to affect negotiable paper not due.

In actions respecting real estate, our statute provides that the pendency of the action shall be constructive notice only from the time of filing notice of *lis pendens* in the office of the register of deeds; but the rule in respect to personal property remains, as at common law, in full force; and we see no reason why the *lis pendens* does not affect promissory notes transferred by a party to the suit during its pendency, and which were

past due at the time of the transfer. They appear to be within the rule as expounded by the cases cited. We hold, therefore, that the pendency of the action was constructive notice to Miller and wife so far as to affect their title to the two notes against West of four hundred dollars each, past due when they received them.

The foregoing was written under the supposition that what was assumed by the counsel for the appellants in his argument, and not denied by the counsel for the respondents,—to wit, that at the time of the transfer of the notes to Miller and wife there was a *lis pendens*,—was true. But on looking into the record we find that the complaint and summons were not filed in the circuit court till the 18th of November, 1861; so that after the service of the summons and complaint, and before they were filed, the notes were transferred to Miller and wife. This presents a new question.

Was the filing of the complaint at or before the time of the transfer absolutely necessary to affect Miller and wife with the constructive notice of *lis pendens*? If the doctrine applies only where a purchaser, upon searching the records of a court, could have actual notice, then the purchasers before the complaint was filed cannot be affected by the suit. In two of the cases above cited, the court say the *lis pendens* begins from the service of the subpoena after the bill is filed, and to the same effect are several other American decisions. But in all these cases the law in force at the time the bill was filed, and the practice of the court, required the bill to be filed before the subpoena was issued; so that there could be no service of the subpoena till after the bill was filed. They cannot, therefore, be regarded as decisions to the effect that the *lis pendens*, in a case where the law authorized the subpoena to issue and be served before the bill was filed, would not begin until the filing of the bill. Formerly the practice was in England for the subpoena to issue before the bill was filed, and the English courts held that there was no *lis pendens* until the service of the subpoena and bill filed, but when the bill was filed, the *lis pendens* existed from the service of the subpoena, although the bill was not filed until long after; so that a purchaser after service of the subpoena, and before the bill was filed, would, after the filing of the bill, be deemed to be a *lite pendente* purchaser: *Pigott v. Nower*, 3 Swanst. 534; S. C., 1 Vern. 318; see also *Newman v. Chapman*, 2 Rand. 102 [14 Am. Dec. 766]. The rule of *lis pendens*, as adopted by the common-law courts,

was not based so much on the idea of notice to the purchaser, actual or constructive, as upon the necessity of such a rule to give effect to their judgments. For at common law the writ was pending from the first moment of the day on which it bore teste and was issued. The code, as to the forms of pleading, has abolished the distinction between law and equity, and permitted, in what before the code were equity cases, the summons to be issued and served before the complaint is filed.

Shall we now adopt the rule, as to *lis pendens*, as held in suits at law, or as relaxed by the chancery courts in England on its first adoption in those courts? or shall it be further relaxed, and declared not to exist until the complaint is filed after service of the summons?

This point has not been argued by counsel, and the arguments of learned counsel are of great assistance to the court.

A rehearing is therefore ordered in this case, the argument to be confined to this point.

The cause was further argued at the February term, 1868, and finally disposed of at the June term of that year.

By Court, PAINE, J. The single question reserved for re-argument was, whether the purchasers of the notes, who purchased in good faith and without any actual notice, were to be charged with constructive notice by reason of the service of the summons and injunction on the original defendants, no papers having at the time of the purchase been filed in the office of the clerk. In principle it would seem clear that they ought not to be so charged. The doctrine of constructive notice cannot justly be applied to the business transactions of men, unless there is a record somewhere, accessible to the party to be affected, and by examining which he may have actual notice. Where this is the case, there is no injustice in applying the rule of *lis pendens*; for the purchaser, by due diligence, might inform himself that the property was in litigation. But where this is not the case, the application of that rule would expose him to damage which no diligence could guard against.

Under the old system of practice the question could not arise, as the bill was required to be filed before an injunction was issued. But this has been changed by the code, so that injunctions may be granted and served, and the papers all remain in the possession of the parties to the suit or their attorneys. No case has been cited under the code where the rule of *lis pendens* has been applied before the papers were filed.

And justice and sound policy require that it ought not to be so applied. This conclusion is supported by the statutory rule concerning the *lis pendens* as affecting real estate.

We are not inclined to adopt the doctrine of relation that has sometimes been applied, so as to hold that when the papers are filed the *lis pendens* relates back to the service. This is only an indirect method of charging a party with notice of that which he had no means of obtaining knowledge of.

The true and just rule is to require the papers to be filed, so as to show upon the records that a suit has been commenced, in which the property is drawn into litigation, before any purchaser is chargeable with notice of it. And this is no hardship upon the plaintiffs.

The judgment is affirmed, with costs.

WHERE COMMERCIAL PAPER IS RECEIVED IN PAYMENT AND EXTINGUISHMENT OF PRE-EXISTING DEBT, the holder is entitled to protection: See *McKnight v. Kneely*, 87 Am. Dec. 384, note 385; note to *Allaire v. Hartshorne*, 47 Id. 182; note to *Bailey v. Smith*, 84 Id. 405.

BONA FIDE HOLDER OF NOTE, WHO IS IN GENERAL: See notes to *Mages v. Badger*, 90 Am. Dec. 695; *Bailey v. Smith*, 84 Id. 405; *Allaire v. Hartshorne*, 47 Id. 182; *Russell v. Haddock*, 44 Id. 698.

LIS PENDENS, DOCTRINE OF, DOES NOT APPLY TO NEGOTIABLE PAPER negotiated before maturity: See *Winston v. Westfeldt*, 58 Am. Dec. 281; *Mims v. West*, 95 Id. 379, note 384; *Diamond v. Lawrence Co.*, 78 Id. 429, note 436.

LIS PENDENS BEGINS WHEN: See *Diamond v. Lawrence Co.*, 78 Am. Dec. 429, 431; *Müller v. Kershaw*, 23 Id. 183, note 186; *Jackson v. Dickenson*, 8 Id. 236. These cases show that a *lis pendens* does not begin until the bill has been filed and a subpoena served. As to *lis pendens* of amended complaint, and of defective complaint, see note to *Pearson v. Keady*, 43 Id. 164.

WOODLE v. WHITNEY.

[28 WISCONSIN, 55.]

IMPLIED WARRANTY OF ARTICLES MANUFACTURED UNDER EXECUTORY CONTRACT. — In case of an executory contract for the manufacture of articles to be delivered at a future day, there is always an implied warranty that the articles delivered shall answer the purpose for which they were designed.

VENDER HAS RIGHT TO RETURN DEFECTIVE CORN CULTIVATOR, MANUFACTURED UNDER EXECUTORY CONTRACT, AND TO RECOVER MONEY PAID ON IT, with interest, where he has received the cultivator under such contract, kept it long enough to give it a fair examination and trial, and found it to be vitally defective.

ACTION on an executory contract for the manufacture and sale of corn cultivators, on the ground that those made were

not such as the contract called for. On May 8, 1866, defendants agreed with plaintiffs to manufacture and construct for the latter, in a good and workmanlike manner, ten corn cultivators of the pattern and model of Howe's cultivator, to be delivered by June 5, 1866, and for which defendants were to pay four hundred dollars. The machines made by defendants, in pursuance of this agreement, were not made in a good and workmanlike manner, but their axle-trees were made of timber unfit for use, and upon the trial of the machines, broke without any fault of plaintiffs. Said machines, in consequence of the worthless timber used, were unfit for the purpose of cultivators, and useless. On June 15, 1866, before the final trial and examination of the machines, plaintiffs, at defendants' request, paid defendants on said contract \$398.34. At the time of such payment, plaintiffs were ignorant of the vital defects in said machines, and paid the money, believing that the contract would be substantially fulfilled by defendants. The machines were on the premises and under the control of defendants after said payment, the same as before. Two or three days after such payment, plaintiffs took some of the machines for trial and examination, and discovered the vital defects therein, and within a reasonable time thereafter, and on the same day of such discovery, returned to defendants' premises the machines so taken, rescinded the contract, and demanded a return of the money so paid, which defendants refused. The court held that plaintiffs were entitled to a reasonable time for the trial and examination of the machines, to return them within a reasonable time if found substantially defective, to receive back the money paid, and to recover the same in this action. Defendants excepted to the findings of fact and conclusions of law, and appealed from a judgment rendered for the plaintiffs.

Charles G. Williams, for the appellants.

Dunwiddie and Medberry, for the respondents.

By Court, DIXON, C. J. In this case we hold that the plaintiffs had a right to rescind the contract, and recover back the money paid. This right was not lost by taking the cultivators for trial. The plaintiffs could receive and test them, and if found defective, return them, and bring their action. This was the view of the court in *Fisk v. Tank*, 12 Wis. 303 [78 Am. Dec. 737], which is fully sustained by the authorities

there referred to, and by the late case of *Reed v. Randall*, 29 N. Y. 358, though the court there seem to hold that the remedy by a return of the property to the vendor after the vendee has had an opportunity of examining it, and a rescission of the contract, is the only one which the vendee has to recover damages, on the ground that the article furnished does not correspond with the contract. It is to be observed, however, that that was not a case of executory contract for the manufacture of articles to be delivered at a future day, as to which there is always an implied warranty that the articles delivered shall answer the purpose for which they were designed. We have no disposition to elaborate a proposition which we consider to be so well settled as that here involved; and believing that the circuit judge was correct both in his findings of fact and conclusions of law, we must affirm the judgment.

Judgment affirmed.

MANUFACTURER'S IMPLIED WARRANTY OF SOUNDNESS, AND LIABILITY FOR DEFECTS in goods manufactured and sold under an executory contract for a particular purpose: See collected cases in note to *Pease v. Sabin*, 91 Am. Dec. 365; *Dickinson v. Gay*, 83 Id. 656; *Hoe v. Sanborn*, 78 Id. 163, note 176; *Rodgers v. Niles*, 78 Id. 290, note 295. As to vendee's duty to return defective machine or other article within a reasonable time after discovery of its defects, where he wishes to rescind, see *Osborn v. Stanley*, 85 Id. 347; note to *Hoe v. Sanborn*, 78 Id. 176; *Reed v. Randall*, 86 Id. 305.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: A party may rescind a contract by reason of the non-performance of its stipulations by the other party, as in the sale of personal property, where the property proves to be different from that contracted for: *School District v. Hayne*, 46 Wis. 515, also giving other illustrations. For a breach of warranty without actual fraud on the part of the vendor, the purchaser is entitled to rescind the contract, and for that purpose may return the goods, or what is the same thing, offer to return them within a reasonable time: *Boothby v. Scales*, 27 Id. 636, where numerous cases are collected on this point; *Merrill v. Nightingale*, 39 Id. 250, applying this principle to machinery, which, after a fair trial, fails to answer the purposes for which it was ordered. It is generally a question of fact for the jury whether an offer to return goods sold, and rescind the contract, is made within a reasonable time: *Churchill v. Price*, 44 Id. 544. If chattels sold under a warranty, express or implied, are defective or unfit for the use intended, and the defects were not open and palpable, and were unknown to the purchaser when he received the goods, he may, without returning or offering to return the goods, and without notifying the vendor of the defects, maintain an action for damages, or if sued for the price, may recoup such damages. But this class of cases must be distinguished from those in which the defect in the article sold is patent. In the latter, the vendee cannot recoup damages for defects in an action for the contract price: *Locke v. Williamson*, 40 Id. 381; *Buffalo Barb Wire Co. v. Phillips*, 67 Id. 132.

RAYMOND v. HOLBORN.

[28 WISCONSIN, 87.]

OBJECTION THAT LAND WAS NOT SOLD IN SEPARATE PARCELS AT EXECUTION SALE CANNOT BE TAKEN AFTER TIME FOR REDEMPTION HAS EXPIRED, either by the judgment debtor himself, by one holding a mortgage on the land, or by a purchaser under the foreclosure of such mortgage.

PURCHASER AT FORECLOSURE SALE TAKES WITH CONSTRUCTIVE NOTICE OF ANY PRIOR SALE ON EXECUTION.

WHERE PRIOR MORTGAGEE IS MADE PARTY ON FORECLOSURE OF SECOND MORTGAGE, AND HIS MORTGAGE IS FIRST PAID, pursuant to the decree, from the proceeds of the sale, the purchaser's rights are subject to the lien of a judgment intermediate between the two mortgages.

PURCHASER AT EXECUTION SALE HAS RIGHT TO REDEEM BY PAYING PRIOR MORTGAGE, or his equitable proportion thereof, where the lands sold on execution are a part only of those covered by the mortgage sale.

ACTION by H. Raymond against F. Holborn, for a partition of lots 5 and 6, block 1, in the city of Racine, of which he claimed to be the owner of an undivided one third. Defendant claimed a paramount right to the whole. On December 28, 1856, E. Raymond, S. Raymond, and one Dutton were the owners of said lots, and mortgaged them to one Moss for three thousand dollars, payable within one year, with interest. On August 21, 1857, they mortgaged the same lots to Lucy J. Holborn for three thousand dollars, payable in two years, with interest. On May 31, 1862, an action was commenced to foreclose the Holborn mortgage, in which Moss was made defendant; and he answered, setting up his mortgage as a prior lien, and stating the amount due thereon. On September 29th, the Holborn mortgage was assigned to the plaintiff, H. Raymond. Shortly afterwards, judgment was rendered in said foreclosure action, in favor of Lucy J. Holborn and of Moss, for the amounts due on their respective mortgages. The premises were ordered to be sold, and the proceeds of the sale, after paying costs of suit, etc., to be applied, first, to pay the amount found due on the Moss mortgage, and the balance to pay the Holborn mortgage. The premises were sold January 29, 1863, to defendant, F. Holborn, and the proceeds disposed of pursuant to the judgment. The sale was confirmed, and the sheriff's deed executed to defendant, who subsequently had possession of the lots. On June 20, 1857, a judgment in favor of one Dewey and one Rhodes, against one Skinner and the above-named E. Raymond, for \$222, was recovered in the circuit court for Racine County. On Novem-

ber 16, 1860, execution issued against the property of Skinner and E. Raymond, under which the undivided one third of said lots 5 and 6, and also a number of other lots in the city of Racine, were levied upon, and on January 5, 1861, were sold in one parcel by direction of the attorney of Dewey and Rhodes, although they were capable of being sold in separate parcels; and they were sold to Dewey and Rhodes for \$253, though their total value was \$4,650. A certificate of sale was executed and filed in the usual form, stating that said sale would become absolute at the expiration of twenty-seven months from the date thereof, unless the premises should be sooner redeemed, etc. On June 8, 1865, said certificate of sale, and all the title and interest of Dewey and Rhodes under it, were assigned to the plaintiff, H. Raymond, and the sheriff's deed in pursuance thereof was executed to him. Defendant had no actual knowledge of said judgment, nor of any of the subsequent proceedings thereon until about the commencement of this action. The court held that the sale on the execution was irregular, and should be set aside, and the sheriff's deed annulled as to the premises here in dispute; that the Moss mortgage was a lien upon the premises paramount to that of the Dewey and Rhodes judgment, and that defendant was entitled to judgment for his costs. Plaintiff excepted to the conclusions of law, and appealed from the judgment.

Paine and Millet, for the appellant.

Fuller and Dyer, for the respondent.

By Court, COLE, J. One of the principal questions discussed in this case, namely, whether the defendant was in a position to take advantage of the irregularity in the execution sale, has in effect already been decided in the negative in *Raymond v. Pauli*, 21 Wis. 531. The counsel for the defendant struggled somewhat with the doctrine of that case, and further attempted to show that there were some facts involved in the present one which really rendered that decision inapplicable. But we are unable to distinguish the cases in principle. It must be admitted that the statutory right of redemption from the execution sale was gone at the time of the foreclosure sale under the Holborn mortgage. The mortgagee in that mortgage had made no effort to redeem from the judgment while the right to redeem existed. She, as well as the judgment debtors, must therefore be presumed to have acquiesced

in the sale, even if she could have in any way taken advantage of the irregularity in not selling the real estate levied on in tracts and parcels separately,—an objection it is doubtful about her being able to make to the sale. The purchaser at the foreclosure sale must be deemed in law to have had notice that the title of the purchaser at the execution sale had become absolute. It is said that he had no actual knowledge of the existence of the Rhodes and Dewey judgment, or of the sale under it. But he must be held to have had constructive notice, at least. The judgment and certificate of sale were matters of record, and had he taken the trouble to examine in respect to the title, he would have learned all about them. This he did not do. Now, upon what principle can the purchaser at the foreclosure sale ask a court of equity to set aside the sale on execution? We have already seen that the judgment debtors could not, after the period of redemption had expired, set aside the sale because the land was not sold in separate parcels. Nor had the mortgagee of the Holborn mortgage any such right. What superior right or equity can the purchaser at the foreclosure sale have to disturb that sale? It is said that he has become interested in the property. True; but can he claim any greater rights therein than the original mortgagors and mortgagee of the Holborn mortgage, so far as the irregularities in the execution sale are concerned? We think not. And if neither of those parties had the right to redeem from the judgment, nor to set the sale aside, it is difficult to understand upon what ground the defendant can do what they could not.

The title of the purchaser at the execution sale, then, having become perfect, what is the true relation of the parties? We are disposed to hold that such purchaser took his title, and still holds it, subject to the prior mortgage interest. Of course the Moss mortgage was paramount and superior to the Rhodes and Dewey judgment. This is not denied. But it is claimed by the counsel for the plaintiff, that, on the foreclosure of the Holborn mortgage, the Moss mortgage was simply paid and discharged. Was this so? In the foreclosure suit brought by Lucy J. Holbron, Moss, the prior mortgagee, was made a party defendant. He came in and answered, setting up his rights. Judgment was rendered that the property covered by the mortgage be sold, and that the Moss mortgage be first paid out of the proceeds of the sale. This was done, and the proceeds so applied.

The Moss mortgage was paid by the sale of the property, and the purchaser at the foreclosure sale took title as well by virtue of the foreclosure of the first as of the second mortgage. Or if it is not technically correct to say that the Moss mortgage was foreclosed, at all events the interest in that mortgage was transferred to the purchaser by that proceeding, and a court of equity will keep it alive, if necessary to protect his rights. What equity is there in saying that the plaintiff takes his parcel of the mortgaged premises discharged of that lien? And why should not the purchaser at the foreclosure have the benefit of a sale which was made to satisfy one mortgage as well as the other? It is true, the prior mortgagee was not an indispensable (though a proper) party to a suit to foreclose the second mortgage. But being made a party, and coming in and demanding payment of his debt, the sale of the land is made to satisfy both liens. The plaintiff's rights, however, were not cut off by the sale, because he was not a party to the suit. And as his judgment lien was subsequent to the Moss mortgage, he ought not to claim any better position since the foreclosure sale. He can redeem by paying his equitable proportion of the prior encumbrance. But whether he can do that in this suit, or whether this action for partition should be stayed until a separate suit is brought for that purpose, is a question of practice that we are not clear enough upon to express an opinion. At all events, the plaintiff was not entitled to the relief demanded in the complaint, because the defendant's rights, to the extent of the Moss mortgage, were paramount. But the circuit court set aside the sale made upon the execution issued on the Rhodes and Dewey judgment, and adjudged the sheriff's deed to be ineffectual to vest the title in the plaintiff. It follows from the views already expressed that this was error.

The judgment of the circuit court is reversed, and the cause remanded for further proceedings.

SALE OF LANDS ON EXECUTION EN MASSE, AND NOT IN SEPARATE PARCELS, EFFECT OF: See note to *Bunker v. Rand*, 88 Am. Dec. 688; *Smith v. Randall*, 65 Id. 475, note 480; *Rector v. Hart*, 41 Id. 650, note 661; note to *Piel v. Brayer*, 95 Id. 703. Foreclosure sale is not invalid because premises were not sold in parcels, according to subdivisions made after the execution of the mortgage: *Street v. Beal*, 85 Id. 504.

LEVY OF EXECUTION ON PROPERTY DOES NOT AFFECT PRIOR ACQUIRED RIGHTS OF MORTGAGEE: See *Nall v. Granger*, 77 Am. Dec. 462.

RIGHT OF JUNIOR MORTGAGEE AND OTHERS TO REDEEM: *Anson v. Anson*, 89 Am. Dec. 514; *Whitney v. Higgins*, 70 Id. 748.

PROPER PARTIES TO SUIT TO FORECLOSE MORTGAGE, AND EFFECT OF DECREE ON THOSE NOT MADE PARTIES: See note to *Whitney v. Higgins*, 70 Am. Dec. 754; *San Francisco v. Lawton*, 79 Id. 187. The first mortgagee is not a necessary party defendant to foreclosure of second mortgage: *Strobe v. Downer*, 80 Id. 709; extended note thereto 714-717, showing the effect of foreclosure as to first mortgagee where the mortgage foreclosed is subsequent to his.

THE PRINCIPAL CASE WAS CITED IN *Watson v. Wilcox*, 39 Wis. 650, to the point that one who, having no interest to protect, voluntarily loans money to a mortgagor for the purpose of satisfying and canceling the mortgage, and taking a new mortgage for his own security, cannot have the former mortgage revived and himself subrogated to the rights of the mortgagee therein; and in *Nelson v. Bronsberg*, 81 Ind. 202, to the point that an execution sale of land, in disregard of the law, which requires it to be offered in parcels, is not void, but only voidable at the instance of the party aggrieved. The remedy is to apply within a reasonable time, and have the sale set aside on that ground. Undoubtedly, a reasonable time must be some time within the period fixed by law for a redemption. If that period be allowed to expire, and a deed be executed, the application cannot afterwards be made, unless under special circumstances of fraud or mistake, showing some reasonable excuse for the delay. By making no effort to redeem while the right to redeem exists, the party must be presumed to have acquiesced in such sale.

KNAPP v. BARTLETT.

[28 WISCONSIN, 68.]

BEVITT v. CRANDALL, 19 WISCONSIN, 581, EXPLAINED.

ANY JUDGMENT DEBTOR MAY CLAIM ARTICLES EXEMPT FROM SALE ON EXECUTION, under subdivision 7, section 31, chapter 134, of the Revised Statutes of Wisconsin of 1858, such as animals, food, farming utensils, etc. The exemption is not limited to farmers only.

ONE CANNOT DOUBLE HIS EXEMPTION FROM SALE ON EXECUTION, under subdivision 9, section 31, chapter 134, of the Revised Statutes of Wisconsin of 1858, which exempts "the tools and implements, or stock in trade, of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business," by carrying on the business both of a mechanic and a miner at the same time.

REPLEVIN for a horse valued at \$175, and a sleigh valued at \$75, which the defendant, as sheriff, seized under an execution against the plaintiff's property. The plaintiff was a practicing physician, and had no other horse or sleigh than those in question, and used these in his business. Defendant offered to show, on cross-examination of the plaintiff, that the latter had professional implements and a library worth over two hundred dollars, the statutory limit; but the offer was refused. The jury were instructed that the property was exempt. Verdict and judgment for the plaintiff, and defendant appealed.

then commenced an action against Adam to recover damages for such unlawful taking, etc., and obtained a judgment against him for \$574 damages, etc., which judgment remained unreversed and unsatisfied. Cotzhausen and Smith, at the time of said pretended sale and assignment to them, were fully informed of all the facts in respect to the ownership of said property, and the rights of the children of said Anna, and that William had no lawful claim thereto as against said children. On the contrary, it was alleged that, in making said purchase, they connived and colluded with said William wrongfully to get possession of said property or its proceeds, and to deprive said children thereof; that they had no just or equitable right as against said children, or against the plaintiff as special administrator, to enforce the collection of said judgment against Adam Reith, or to receive the money due thereon, but that the same ought to be paid to the plaintiff as special administrator. Cotzhausen and Smith, however, had had an execution issued and placed in the hands of the sheriff, Alden, who levied upon sufficient property of Adam Reith to satisfy the judgment, and advertised the same for sale on January 10, 1867. The complaint also alleged that if said judgment should be collected, and the money paid to Cotzhausen and Smith, plaintiff would be unable to recover from them, or either of them, the amount of the judgment, or the proceeds of the property of said estate, which, by means of said fraudulent assignment and said judgment, they would have wrongfully recovered and collected from said Adam. On December 18, 1866, plaintiff was appointed special administrator to collect and take charge of said Anna's estate. He brought this action, and prayed for judgment that the property taken by Adam Reith, and the proceeds thereof, were the property of said Anna, and belonged to her estate, and to plaintiff as administrator; that said Alden, Cotzhausen, and Smith, etc., be restrained from collecting or enforcing said judgment against Adam Reith; and that said Adam deliver said property, or pay over the proceeds and true value thereof, to plaintiff, for the use of said estate; and for general relief. Afterwards, apparently in March or April, 1867, the plaintiff discontinued his suit as against A. Reith, Smith, and Alden, and filed a supplemental complaint against Cotzhausen and Birkhauser, which alleged that after the commencement of this action, and on or about February 16, 1867, Alden, as sheriff, proceeded under said execution to enforce and collect said judgment against Adam Reith; that the lat-

ter paid Alden the full amount of the judgment, etc., and that the money was thereafter paid to Cotzhausen, who claimed to be the sole owner of said judgment at that time, and that the money so paid him was his sole and lawful property, and that he had a lawful right to hold the same. But the complaint alleged that said money, in fact, in equity and good conscience, was the property of the plaintiff as special administrator, etc., and rightfully belonged to said estate, whereupon judgment was demanded that said money belong to said estate, and that Cotzhausen account for and pay the same into the court or to plaintiff for the use of said estate, with interest, etc., and for general relief. A demurrer to the complaint, as not stating a cause of action, was overruled, and defendant Cotzhausen appealed.

Mann and Cotzhausen, for the appellant.

Levi Hubbell, for the respondent.

By Court, DIXON, C. J. This action is without precedent, and cannot be maintained. If, as the complaint alleges and the plaintiff contends, Adam Reith committed a trespass in taking and carrying away the property which belonged to the estate of Mrs. Birkhauser, deceased, of which estate the plaintiff is special administrator, then the plaintiff has his remedy by action against Adam Reith to recover the damages, and the suit by Cotzhausen and Smith against Adam Reith to recover damages for the taking and conversion of the same property, they claiming it to have been theirs, and the recovery by them, are transactions in which the plaintiff is in no way concerned. In an action by the plaintiff against Adam Reith, he cannot set up that suit in defense, or mitigate the damages by reason of the recovery there had against him. The theory of this action is, that as Cotzhausen and Smith have brought suit and recovered judgment against the person who committed trespass by taking the property of the plaintiff's intestate, therefore the plaintiff has a right to interfere, and by injunction to restrain and control that litigation. The plaintiff has no such right. He has no interest whatever in the controversy as between those parties, and, as suggested, his only motive seems to be to relieve Adam Reith, if possible, from the payment of the Cotzhausen and Smith judgment, which he conceives to have been unjust and unfounded; which motive, though it may be very commendable in itself, is, unluckily for the purposes

which the plaintiff desires to accomplish, not sufficient to authorize him to maintain this action. Adam Reith may have been, and, as would appear from the statements of the complaints, undoubtedly was, very unfortunate; but, like many others who, with the best intentions, have become entangled in the meshes of the law, he must be relieved, if at all, on his own application to the courts; and if he cannot be so relieved, his benevolent neighbors or acquaintances cannot be permitted to bring suits for him.

Order reversed.

STROHN v. DETROIT AND MILWAUKEE R. R. Co.

[28 WISCONSIN, 126.]

RAILROAD COMPANY IS BOUND BY ITS FREIGHT AGENT'S CONTRACT TO TRANSPORT GOODS within a specified time, if it be a reasonable time.

RAILROAD COMPANY IS NOT ABSOLUTE INSURER OF GOODS which its agent has contracted to deliver within a specified time; but their non-delivery will be excused if they are destroyed within the prescribed time by the act of God or of the public enemy.

CONTRACT TO DELIVER GOODS WITHIN SPECIFIED TIME IS NOT SHOWN WHEN. — A mere statement by a railroad company's agent that the ordinary time for transportation over the proposed route is a certain number of days does not constitute an agreement to carry in that time; nor is it sufficient to overcome the effect of the bills of lading or receipts as evidence of the real contract.

SUFFICIENCY OF EXCEPTIONS TO CHARGE GIVEN TO JURY — NECESSITY FOR SPECIFIC OBJECTIONS. — An exception to the general charge to a jury, especially if such charge is lengthy, must point out specifically the portion of the charge objected to. Thus where such a charge consisted of about forty folios, defendant excepted generally; and also excepted "to the rejection of the instructions asked by it, to all that part of the charge wherein the instructions given at its request were in any wise qualified or against it, to all that part wherein the court commented on the evidence, and to all the remarks to the jury not relating to points raised or to the merits of the case": *held*, that the exceptions were too general to raise any question except as to the correctness of the instructions asked by defendant and refused.

ACTION for damages accruing to the plaintiffs from defendants' failure to carry plaintiffs' goods from Milwaukee to New York, and to deliver them at the latter city within fifteen days, as it was alleged defendants had contracted to do; also for damages resulting from improper handling, etc. For a prior decision of this court, on a former appeal in the same cause, see *Strohn v. Detroit etc. R'y Co.*, 21 Wis. 554. On the trial, testimony offered by defendants as to the absence of

authority on the part of their agent in Milwaukee to make the time contract alleged in the complaint was rejected. The court subsequently instructed the jury that the agreement to carry within a specified time would be binding if the time named was a reasonable one. The questions discussed here arose upon the general charge of the court, and upon its refusal of certain instructions asked by the defendants. The only one of these instructions passed upon by court is recited in the opinion. The form of exceptions taken to the general charge also appears in the opinion. Verdict and judgment for the plaintiffs, and defendants appeal. Other facts are stated in the opinion.

Emmons and Van Dyke, for the appellants.

F. W. Cotzhausen, for the appellees.

By Court, COLE, J. The first point made by the counsel for the appellant is, that the judgment of the county court should be reversed for certain matters contained in the general charge. It is said that the charge is intemperate in its language, partisan in its spirit, and well calculated to prejudice the defendant's cause in the minds of the jury. It appears to us that some of the remarks of the county judge, if not marked by a spirit of partiality amounting to prejudice, were certainly calculated to exert an improper influence upon the finding of the jury; and were proper exceptions taken to them, would require a reversal of the judgment. But the exceptions are not sufficient to enable the appellant to avail himself of this objection to the charge. The general charge consists of about forty folios, and the exception is as follows: "The defendant thereupon excepted, — 1. Generally to the charge; and 2. To the rejection of those instructions asked for by the defendant, and to all that part of the charge wherein those points desired by the defendant that were given were in any wise qualified or against him; and to all that part of the charge wherein the court has commented on the evidence, and to all the remarks to the jury not relating to points raised, or to the merits of the case."

Now, it is very evident that this exception does not point out to the mind of the judge, nor call his attention to, the particular portion of the charge to which objection was taken. Had it been more specific, the judge might possibly have corrected his charge, or made some explanation which would have

removed the unfavorable impression left by the remarks now complained of. The charge was lengthy, combining a variety of propositions and topics; and merely to say that one excepts to those parts of the charge "wherein the court has commented on the evidence, and to all the remarks to the jury not relating to the points raised on the merits of the case," really amounts to nothing more than a general exception. It is quite too loose and indefinite to raise any question upon any portion of the charge: *Gilman v. Thiess*, 18 Wis. 528; *Chamberlain v. Pratt*, 33 N. Y. 47; *Newell v. Doty*, 33 Id. 83.

We cannot, therefore, reverse the judgment for this objection to the charge. But the exception is sufficient to raise the question as to the rejection of certain instructions asked by the defendant. And we think the first instruction asked and refused should have been given. That instruction was as follows: "Before the jury can find a verdict for the plaintiffs in this case, they must find the fact that there was a contract on the part of the company defendant to carry the goods in question through to New York within fifteen days from the date of their delivery to defendant at Milwaukee; mere statements that the ordinary time of carriage was from ten to fifteen days, if honestly made, and without intent to deceive, will not be sufficient to overrule the written contract."

It was claimed by the plaintiffs that the railroad company, by its agents, had entered into a contract to transport certain property belonging to them from Milwaukee to New York within fifteen days. The defense was, that the company had made no time contract, but that certain bills of lading or receipts introduced on the trial contained the true conditions of the contract. The general freight agent of the company at Milwaukee stated that one of the plaintiffs came to him to learn at what rates they would undertake the carriage of the goods by his line, saying that he (plaintiff) would have to give bonds for the liquors, and that it would require they should be got to New York within a month, and then asked if the witness would guarantee the transportation in that time; that he replied he would not guarantee any time, but the usual time in which freight went through was fifteen or twenty days. Of course it was material for the plaintiffs, in order to maintain the action, to show that there was a contract on the part of the defendant to carry the goods to New York within fifteen days from the date of their delivery in Milwaukee.

This was their case. And the instruction was, that the jury

must find the fact that such a contract was entered into, and that mere statements that the ordinary time of carriage was from ten to fifteen days, if honestly made, were not sufficient to show such a time contract, nor to overcome and destroy the presumption which would otherwise arise upon the bill of lading. It appears to us that this was a proper instruction to give the jury, and that it was pertinent to the testimony. The bills of lading were before the jury. And the main question was, whether they constituted the real contract between the parties, or whether there was a different parol contract made before the bills of lading were given. And it is clear that mere statements by the agent that the ordinary time of carriage was from ten to fifteen days would not be sufficient to show such parol contract, nor overcome the effect of the bills of lading or receipts as evidence of the real contract. It is said that the instruction was not technically correct, because the words "written contract" are used at the close. These words obviously refer to the bills of lading or receipts which had been offered in evidence. We do not think the instruction could have been misunderstood by the jury.

Another question discussed upon the argument was, whether it was within the scope of the authority of the freight agent at Milwaukee to make the time contract alleged. The county court held, in effect, the law to be, that if the agreement to transport the goods as to time was within a reasonable time, then it was within the scope of the employment of the agent to make the contract, and that it would bind the company.

It is claimed that this view of the law is erroneous. For, it is said, admitting that the local agent might contract for the transportation of goods within a reasonable time, yet when he contracts to deliver within a specified time, he imposes upon the company an obligation greatly beyond the liability which the common law imposes upon a carrier; that in the latter case, nothing will excuse, not even an impossibility of complying with the contract to deliver within the time, nor an act which would excuse a delivery when the contract was to deliver within a reasonable time. We do not understand, however, that when a railroad company, by its agent, agrees to deliver goods within a prescribed time, it becomes an absolute insurer of the goods, and must deliver at all events, or pay for the property. We suppose if the goods were destroyed by an act of God or the public enemy before the time for delivering them expired, this would excuse the carrier on the special

removed the unfavorable impression left by the remarks now complained of. The charge was lengthy, combining a variety of propositions and topics; and merely to say that one excepts to those parts of the charge "wherein the court has commented on the evidence, and to all the remarks to the jury not relating to the points raised on the merits of the case," really amounts to nothing more than a general exception. It is quite too loose and indefinite to raise any question upon any portion of the charge: *Gilman v. Thiess*, 18 Wis. 528; *Chamberlain v. Pratt*, 33 N. Y. 47; *Newell v. Doty*, 33 Id. 83.

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It was claimed by the plaintiffs that the railroad company, by its agents, had entered into a contract to transport certain property belonging to them from Milwaukee to New York within fifteen days. The defense was, that the company had made no time contract, but that certain bills of lading or receipts introduced on the trial contained the true conditions of the contract. The general freight agent of the company at Milwaukee stated that one of the plaintiffs came to him to learn at what rates they would undertake the carriage of the goods by his line, saying that he (plaintiff) would have to give bonds for the liquors, and that it would require they should be got to New York within a month, and then asked if the witness would guarantee the transportation in that time; that he replied he would not guarantee any time, but the usual time in which freight went through was fifteen or twenty days. Of course it was material for the plaintiffs, in order to maintain the action, to show that there was a contract on the part of the defendant to carry the goods to New York within fifteen days from the date of their delivery in Milwaukee.

This was their case. And the instruction was, that the jury

must find the fact that such a contract was entered into, and that mere statements that the ordinary time of carriage was from ten to fifteen days, if honestly made, were not sufficient to show such a time contract, nor to overcome and destroy the presumption which would otherwise arise upon the bill of lading. It appears to us that this was a proper instruction to give the jury, and that it was pertinent to the testimony. The bills of lading were before the jury. And the main question was, whether they constituted the real contract between the parties, or whether there was a different parol contract made before the bills of lading were given. And it is clear that mere statements by the agent that the ordinary time of carriage was from ten to fifteen days would not be sufficient to show such parol contract, nor overcome the effect of the bills of lading or receipts as evidence of the real contract. It is said that the instruction was not technically correct, because the words "written contract" are used at the close. These words obviously refer to the bills of lading or receipts which had been offered in evidence. We do not think the instruction could have been misunderstood by the jury.

Another question discussed upon the argument was, whether it was within the scope of the authority of the freight agent at Milwaukee to make the time contract alleged. The county court held, in effect, the law to be, that if the agreement to transport the goods as to time was within a reasonable time, then it was within the scope of the employment of the agent to make the contract, and that it would bind the company.

It is claimed that this view of the law is erroneous. For, it is said, admitting that the local agent might contract for the transportation of goods within a reasonable time, yet when he contracts to deliver within a specified time, he imposes upon the company an obligation greatly beyond the liability which the common law imposes upon a carrier; that in the latter case, nothing will excuse, not even an impossibility of complying with the contract to deliver within the time, nor an act which would excuse a delivery when the contract was to deliver within a reasonable time. We do not understand, however, that when a railroad company, by its agent, agrees to deliver goods within a prescribed time, it becomes an absolute insurer of the goods, and must deliver at all events, or pay for the property. We suppose if the goods were destroyed by an act of God or the public enemy before the time for delivering them expired, this would excuse the carrier on the special

contract. The parties are presumed to contract with reference to the responsibility which the common law imposes upon the carrier in ordinary cases, the carrier assuming the risk in respect to the time. Such, it seems to us, is the extent of liability assumed by the special agreement. And with this understanding as to the meaning and obligation of the time contract alleged to have been made, we think the county court was correct in holding that it was within the scope of the employment and duty of the agent to make it, and bind the company.

We were requested to pass upon the question of the authority of the agent to make a time contract, and we have done so, although not strictly necessary in the disposition of this appeal. We therefore deem it unnecessary to pursue the discussion further at the present time.

The judgment of the county court is reversed, and a new trial ordered.

BILL OF LADING IS BOTH RECEIPT AND CONTRACT: See note to *Chandler v. Sprague*, 38 Am. Dec. 409, showing the effect of a bill of lading as evidence, and how far it may be varied or controlled by parol, generally.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: A general exception to an entire charge of a court to the jury raises no question on review, unless the whole charge is wrong: *Strachan v. Muzlow*, 31 Wis. 206; *Heath v. Heath*, 31 Id. 229. The charge of the primary court will not be reviewed on appeal, unless specific exceptions to instructions were taken at the trial court, calling the court's attention to the errors complained of, in order that an opportunity might have been offered to modify or withdraw the objectionable portions, should the judge have deemed them incorrect: *Hungerford v. Redford*, 29 Id. 350; *Bigelow v. West Wisconsin Ry Co.*, 27 Id. 483.

HOW TO OBTAIN GIVING OF INSTRUCTIONS TO JURY, AND TO OBTAIN REVIEW OF ERRORS IN GIVING OR REFUSING TO GIVE INSTRUCTIONS ON CERTAIN POINTS. — 1. *General Duty of Courts in Giving or Refusing Instructions.* — The general rule is, that a court is not bound to instruct the jury unless required by one party or the other to do so; and that an omission to instruct, unless requested by one party or the other to do so, is no ground of exception, and is not error available on motion for a new trial, or sufficient to reverse the verdict or judgment: *Owings v. Trotter*, 1 Bibb, 159; *Shewmake v. Jones's Ex'rs*, 37 Ga. 102; *Fortner v. Flannagan*, 3 Port. 257; *Walker v. Humbert*, 55 Pa. St. 407; *Cole v. Taylor*, 22 N. J. L. 59; *Maynard v. Fellows*, 43 N. H. 255; *Madsden v. Phoenix Fire Ins. Co.*, 1 S. C. 24; *Churchman v. Smith*, 6 Whart. 146; S. C., 36 Am. Dec. 211; *Brittain v. Doylestown Bank*, 5 Watts & S. 87; S. C., 39 Am. Dec. 110; *State v. Scott*, 4 Ired. 409; S. C., 42 Am. Dec. 148; *Meares v. Commissioners of Wilmington*, 9 Ired. 73; S. C., 49 Am. Dec. 412; *Deal v. Bogue*, 20 Pa. St. 228; S. C., 57 Id. 702; *Holliday v. Rheem*, 18 Pa. St. 465; S. C., 57 Am. Dec. 628; *Moore v. Fitchburg R. R. Corp.*, 64 Am. Dec. 83; *Reeves v. Delaware etc. R. R. Co.*, 72 Id. 713, note 720; *Mullen*

v. *Wilson*, 44 Pa. St. 413; S. C., 84 Am. Dec. 461, note 464; *Brown v. Calloway*, 90 N. C. 118; *Chamblee v. Tarbox*, 27 Tex. 139; S. C., 84 Am. Dec. 614; *Siegel v. Robinson*, 56 Pa. St. 19; S. C., 93 Am. Dec. 775. Especially cannot an omission in an instruction which inures to the advantage of appellant be urged by him on appeal: *State v. Baltimore etc. R. R. Co.*, 24 Md. 84; S. C., 87 Am. Dec. 600. While a party cannot complain of the failure of the court to give the jury instructions which he has neglected to ask, yet this rule does not apply where the charge given by the court upon the questions involved is itself erroneous and misleading: *Chamblee v. Tarbox*, 27 Tex. 139; S. C., 84 Am. Dec. 614. The omission to give instructions that might have been proper, if asked, is not error, but only the giving of wrong instructions or the refusing of right ones when asked: *State v. Scott*, 4 Ired. 409; S. C., 42 Am. Dec. 148; *Brown v. Calloway*, 90 N. C. 118. And a failure to give instructions is not a subject of exceptions, unless they are requested, refused, and an exception taken to such refusal: *Moore v. Fitchburg R. R. Corp.*, 4 Gray, 465; S. C., 64 Am. Dec. 83.

Where full instructions are not given, or where an instruction is good, so far as it goes, but does not contain a full statement of the law applicable to the case, or where full instructions are not sufficiently pointed or explicit, it is the duty and right of the objecting party to have the charge specifically applied to every point arising on the evidence, and to call the attention of the court to the omission or other defect, and to request further or specific instructions or explanations; and if he fails to do so before the jury retire, or at latest, before they return their verdict, the omission of the court to give instructions which would have been proper, its inexactness in giving the charge, or its refusal to charge after such time, if such omissions or acts are not misleading, is not error subject to exception, and is not ground for a reversal or motion for a new trial. A verdict will not be set aside because instructions were not as full or as favorable to the party as they might have been, when no particular instructions were asked: *McCausland v. Cresap*, 3 G. Greene, 161; *Adams v. Stringer*, 78 Ind. 175; *Allen v. Blunt*, 2 Wood. & M. 121; *State v. Catlin*, 3 Vt. 530; S. C., 23 Am. Dec. 230; *Alcop v. Swathel*, 7 Conn. 500; *Express Company v. Kountze*, 8 Wall. 342; *Fortner v. Flannagan*, 3 Port. 257; *Hunt v. Toulmin*, 1 Stew. & P. 178; *Linn v. Wright*, 18 Tex. 317; S. C., 70 Am. Dec. 282; *Wright v. Boynton*, 37 N. H. 9; S. C., 72 Am. Dec. 319; *Weamer v. Juart*, 29 Pa. St. 257; S. C., 72 Am. Dec. 627; *Reeves v. Delaware*, 30 Pa. St. 454; *Rhodes v. Sherrod*, 9 Ala. 63; *Moore v. Fitchburg R. R. Corp.*, 4 Gray, 465; S. C., 64 Am. Dec. 83, note 87; *Brittain v. Doylestown Bank*, 5 Watts & S. 87; S. C., 39 Am. Dec. 110; *Siegel v. Robinson*, 56 Pa. St. 19; S. C., 93 Am. Dec. 775; *Borngeesser v. Harrison*, 12 Wis. 544; S. C., 78 Am. Dec. 757; *Holliday v. Rheem*, 18 Pa. St. 465; S. C., 67 Am. Dec. 628; *Churchman v. Smith*, 6 Whart. 146; S. C., 36 Am. Dec. 211; *Kauffman v. Griesmeyer*, 26 Pa. St. 407; S. C., 67 Am. Dec. 437; *Herbert v. Huie*, 1 Ala. 18; S. C., 34 Am. Dec. 755; *Brownell v. Commercial Bank*, 3 Cold. 46; *Goodrich v. Eastern R. R.*, 38 N. H. 390; *Hooksett v. Amoskeag Mfg. Co.*, 44 Id. 105; *Brown v. State*, 28 Ga. 199; *Shewmaka v. Executors of Jones*, 37 Id. 102; *Hutchinson v. Dearing*, 20 Ala. 798; *Taylor v. Kelly*, 31 Ala. 59; S. C., 68 Am. Dec. 150.

But a court has the power to instruct the jury on all questions of law growing out of the facts of the cause, without a request from either party; and it is the better practice for the judge in all cases to give the jury a knowledge of the definitions and principles of law applicable to the case: *Nason v. United States*, 1 Gall. 53; *Tresca v. Maddox*, 11 La. Ann. 206; S. C., 66 Am.

Dec. 198. The judge in every case should see that it so goes to the jury, that they have clear and intelligent notions of the points they are to decide, and to this end he should give necessary instructions, whether requested by counsel or not. In Iowa, this is held to be the judge's duty, and his failure to do so is held sufficient ground for a new trial where the verdict works injustice between the parties: *Owen v. Owen*, 22 Iowa, 270. And where the statute requires it, the judge must instruct the jury in writing: See cases cited *infra*. On the other hand, when asked by either party, it is the duty of the court to give or refuse to give instructions upon every point pertinent to the issue involved: *Lender v. People*, 6 Ill. App. 98; *Lopish v. Wells*, 6 Me. 175; *Beall v. Beall*, 10 Ga. 342; *Lytle v. Boyer*, 33 Ohio St. 506; *Keitt v. Spencer*, 19 Fla. 748; *Marie v. Thomas*, 14 Tex. 583; *Alsop v. Swathel*, 7 Conn. 500; *Vaughan v. Porter*, 16 Vt. 286; *Potter v. Wooster*, 10 Iowa, 334; *Campbell v. Miller*, 38 Ga. 304; *Owings v. Trotter*, 1 Bibb, 159. The fact that the jury are made judges of the law as well as the facts, in criminal cases, is no reason why the court should refuse to instruct the jury on the law of the case, when requested: *Lender v. People*, 6 Ill. App. 98. The charge of the court to the jury should be founded on and be applicable to the issues and testimony in the case, and the charge must apply to an issue in order to be the subject of review: *Lytle v. Boyer*, 33 Ohio St. 506; *Campbell v. Green*, 1 Minor, 30; *Goodrich v. Eastern R. R.*, 38 N. H. 390. It is not incumbent on a judge to charge the jury *in extenso*, but only as to such points as are made the ground of objection: *Commonwealth v. Child*, 10 Pick. 252; *Alsop v. Swathel*, 7 Conn. 500. But it is the court's duty, when required to do so, to expound written testimony: *Branch Bank v. Boykin*, 9 Ala. 320. A judge is not required to separate the matters contained in one request, and make a portion of it, which is pertinent, his instructions to the jury, and withhold the rest: *Bryant v. Crosby*, 40 Me. 9. The court may withdraw an instruction given to the jury before they retire: *Donnell v. Jones*, 17 Ala. 689; S. C., 52 Id. 194. While the court cannot be called upon as a matter of right to instruct the jury as to the consequences which may flow from their verdict, it may, in its discretion, so instruct them: *Keller v. Strasburger*, 90 N. Y. 879. It is not error for the court to refuse to recall a jury upon request of counsel for a further or additional charge, without valid or reasonable grounds being shown: *Bowling v. Memphis etc. R. R. Co.*, 15 Lea, 122.

2. *Party Desiring Instructions must Ask for Them in Writing*, and when so requested they must be either given or refused by the court. The charge of the court, as well as the request, must also be in writing. These are statutory rules in most of the states. Before the court can be required to give particular instructions, there must, however, be evidence, relevant and pertinent, on which to found them. But when a proper written instruction, material to a question in the case, and substantially correct, is presented to the court, with a request that it be given to the jury, and the court refuses to give the charge requested, it is error for which, if properly excepted to, a reversal may be had. As to these propositions, see *Lytle v. Boyer*, 33 Ohio St. 506; *Goodrich v. Eastern R. R.*, 38 N. H. 390; *Bradway v. Waddell*, 95 Ind. 170; *City of Atchison v. Jansen*, 21 Kan. 560; *Bates v. Ball*, 72 Ill. 106; *Loselle v. Wells*, 17 Ind. 33; *Boggs v. Clifton*, 17 Id. 217; *Tenbrook v. Brown*, 17 Id. 410; *Doggett v. Jordan*, 2 Fla. 541; *Bloomer v. Sherrill*, 11 Ill. 483; *Treaca v. Maddox*, 11 La. Ann. 206; S. C., 66 Am. Dec. 198; *Keitt v. Spencer*, 19 Fla. 748; *Campbell v. Miller*, 38 Ga. 304; S. C., 95 Am. Dec. 389; *Pats v. Wright*, 30 Ind. 476; S. C., 95 Am. Dec. 705; *Stewart v. Statc*, 50 Miss. 587; *Continental Nat. Bank v. Folsom*, 67 Ga. 624; *Bottorff v. Shelton*, 79 Ind. 96;

Shafer v. Stinson, 76 Id. 374; *Provinces v. Heaton*, 67 Id. 482; *Wilson v. State*, 15 Tex. App. 150; *Dorsett v. Oreo*, 1 Col. 18; *Gile v. People*, 1 Id. 60; *Lyon v. Kent*, 45 Ala. 656; *Dixon v. State*, 13 Fla. 636; *Prater v. Snead*, 12 Kan. 447; *City Bank of Macon v. Kent*, 57 Ga. 283; *Harvey v. Tama Co.*, 53 Iowa, 228; *Pemberthy v. Lee*, 51 Wis. 261; *Tyree v. Parham's Ex'r*, 66 Ala. 424; *Hadley v. Atkinson*, 84 Ind. 64; *Smarr v. State*, 88 Id. 504; *Davis v. Foster*, 68 Id. 238; *Bosworth v. Barker*, 65 Id. 595; *Territory of Arizona v. Dorman*, 1 Ariz. 56; *Territory of Arizona v. Duffield*, 1 Id. 58; *Territory of Arizona v. Gertrude*, 1 Id. 74; *Territory of Arizona v. Kennedy*, 1 Id. 505; *Householder v. Granby*, 40 Ohio St. 430; *Wheatley v. West*, 61 Ga. 401; *State v. Bungardner*, 7 Bart. 163; *Myatts v. Bell*, 41 Ala. 222; *Patterson v. Ball*, 19 Wis. 243; *Hardy v. Turney*, 9 Ohio St. 400; *Hogel v. Lindell*, 10 Mo. 483; *Parris v. State*, 2 G. Greene, 449; *Kellar v. Belleaudaux*, 5 La. Ann. 609; *Head v. Langworthy*, 15 Iowa, 235; *Riley v. Watson*, 18 Ind. 291; *Rising Sun etc. Co. v. Conway*, 7 Id. 187. In some of the states, the statutory rule, requiring the charge of the court to be in writing, applies only to criminal cases; in others only to civil cases; and in other states it applies to both civil and criminal cases. There seems to be no such statute in Maryland, and it is there within the discretion of the court to give instructions to the jury orally or in writing; but where verbal instructions are given, it is the right of the party who desires to except thereto to have them reduced to writing, so that they may be reviewed on appeal: *Smith v. Orichton*, 33 Md. 103. But when a statute requiring the court to instruct the jury in writing, if required by either party, does exist, it is mandatory, and the giving of oral instructions instead of a written charge is error for which a reversal may be had. The written request for instructions must be given in the terms and language of the request, without any oral modification, alterations, or verbal explanations of any kind whatsoever, upon matters material to the issue. If requested, the instructions must be written, and be given as written; or, if not, they must be refused. A party has the right, if properly asserted, of having all necessary modifications and explanations of written instructions reduced to writing. A disregard of these provisions is error compelling a reversal. In support of these propositions, see *Bradway v. Waddell*, 95 Ind. 170; *Pemberthy v. Lee*, 51 Wis. 263; *City of Atchison v. Jansen*, 21 Kan. 560; *Bottomoff v. Shelton*, 79 Ind. 98; *Shafer v. Stinson*, 76 Id. 374; *Wilson v. State*, 15 Tex. App. 150; *Gile v. People*, 1 Col. 60; *Dixon v. State*, 13 Fla. 637; *Prater v. Snead*, 12 Kan. 447; *City Bank etc. v. Kent*, 57 Ga. 283; *Tenbrook v. Brown*, 17 Ind. 410; *Wheatley v. West*, 61 Ga. 401; *Hadley v. Atkinson*, 84 Ind. 64; *Toledo etc. R. R. Co. v. Daniels*, 21 Id. 256; *Riley v. Watson*, 18 Id. 291; *Head v. Langworthy*, 15 Iowa, 235; *Territory of New Mexico v. Romine*, 2 N. M. 114; *Householder v. Granby*, 40 Ohio St. 430; *Bosworth v. Barker*, 65 Ind. 595; *Smarr v. State*, 88 Id. 504; *Davis v. Foster*, 68 Id. 238; *Rising Sun etc. Co. v. Conway*, 7 Id. 187. The whole charge must be in writing, and be given literally as it is written: See case last cited.

Legal instructions may be refused or given in a modified form in writing, as the circumstances and evidence of the case may require: *Parris v. State*, 2 G. Greene, 449. The judgment will be reversed, in Indiana, whether the oral modification given to a written request is in itself right or wrong: *Hardin v. Helton*, 50 Ind. 319; *Meredith v. Crawford*, 34 Id. 399. Whatever the court may say to the jury in regard to the principles of law applicable to the case, or in regard to the evidence, is a part of the charge, and must be reduced to writing at the request of either party: *Hasbrouck v. City of Milwaukee*, 21 Wis. 217; but mere general remarks on other subjects are

no part of the charge; as, where the judge adds oral remarks in regard to the length of the trial, and apologizes for his impatience during its progress: 21 Id. 238; or where, after the jury has been charged, and a juror asks a question as to the rights of the parties, the judge gives him an affirmative answer — “yes” or “no” — without reducing it to writing: *Millard v. Lyons*, 25 Id. 516; or, or where he verbally orders the jury to bring in a verdict for defendant: *Milne v. Walker*, 59 Iowa, 186; *Bradway v. Waddell*, 95 Ind. 170. So where the jury have been instructed to make certain special findings, and return with them into court without having them signed, an oral instruction to make said special findings, and to sign the same, is no part of the “instructions”: *Prater v. Sneed*, 12 Kan. 447. Oral directions to the jury to reject evidence, made when it is given, or as to the form of their verdict or other collateral matters, are not “instructions”: *Stanley v. Sutherland*, 54 Ind. 339; *City of Atchison v. Jansen*, 21 Kan. 560; *Bradway v. Waddell*, 95 Ind. 170; but a direction as to the amount of recovery is an “instruction”: See case last cited. Where the court is required by statute to instruct the jury in writing, it is fatal error to read from printed statutes, if excepted to. The matter must be copied into a written instruction, and read from the copy: *Smarr v. State*, 88 Id. 504; *Wilson v. State*, 15 Tex. App. 150. The reading of a statute amounts to a verbal charge: See case last cited. But we apprehend that a different view of this matter prevails in states where, by statute, “writing” includes printing, as in California: See Cal. Pol. Code, sec. 17. A statute providing that “if the charge be not given in writing, it must be taken down by the phonographic reporter,” is mandatory, and not merely directory: *People v. Hersey*, 53 Cal. 574; *Pemberty v. Lee*, 51 Wis. 263. A failure to give the charge in writing, or to have it taken down by the official phonographic reporter of the court, will, on appeal, work a reversal of the judgment upon the verdict, unless a charge in writing is waived by counsel at the commencement of the trial. The object of the statute is to enable a suitor in court to preserve of record the precise language of the instructions given by the court to the jury, and thus avoid the danger of inaccuracy which the suitor would be exposed to if the charge is not reduced to writing until the bill of exceptions is settled: *Pemberty v. Lee*, *supra*. It is, therefore, in cases where such a statute is applicable, error *per se* for the court to further instruct the jury orally upon their request, in the absence of the phonographic reporter, and without the consent of the respective counsel: *People v. Hersey*, 53 Cal. 574. While a statute may require instructions to be given to the jury in writing, there is no doubt that the parties may waive that provision of the law, and when they do so, and consent that the court may instruct the jury orally, they are estopped from afterwards objecting: *Bates v. Ball*, 72 Ill. 108; *State v. Buegardner*, 7 Baxt. 163; *Territory of Arizona v. Dorman*, 1 Ariz. 56; *Territory of Arizona v. Duffield*, 1 Id. 58; *Territory of Arizona v. Gertrude*, 1 Id. 74; *Territory of Arizona v. Kennedy*, 1 Id. 505; *Continental Nat. Bank v. Folsom*, 67 Ga. 624.

But it is held in Indiana that if the court disregards a proper request to instruct in writing, and orders a stenographer to take down its oral statements, a failure to object to the mode of preserving the evidence of such charge is no waiver of the request, and such mode will not satisfy the requirements of the statute: *Shaffer v. Stinson*, 76 Ind. 374. And a rule of court which declares that unless a proper request for written instructions shall be made at or before the commencement of the trial, it shall be deemed to have been waived, cannot be sustained: *Patterson v. Ball*, 19 Wis. 243; *Leselle v.*

Wells, 17 Ind. 33. A statute requiring instructions asked to be in writing is sufficiently complied with when such instructions are written in pencil: *Harvey v. Tama Co.*, 53 Iowa, 228. When charges are given, it is the imperative duty of the presiding judge to so indorse them; but a failure to do so is not available error in Alabama, unless excepted to before the jury, if they have been permitted to take them without such indorsement: *Tyres v. Parham's Ex'r*, 66 Ala. 424. In Indiana, unless instructions are signed and filed, as required by statute, or incorporated in a bill of exceptions properly filed, or filed by an order of court, they cannot become a part of the record: *Hadley v. Atkinson*, 84 Ind. 64. The record must show that the written charge was read to the jury, unless waived: *Territory of Arizona v. Gertrude*, 1 Ariz. 74; *Territory of Arizona v. Kennedy*, 1 Id. 505. If the charge is not committed to writing before the jury retire, the error is not cured by subsequently reducing it to writing: *Territory of Arizona v. Kennedy*, 1 Id. 505; *Territory of Arizona v. Duffield*, 1 Id. 58. The object of the law requiring instructions to be written is simply to enable them to be preserved in the files, so as to be available for exception or on appeal; and where the instructions are written in English, an oral translation of them into Spanish, for the benefit of a Spanish jury, is not a violation of the law, as being oral instructions: *Territory of New Mexico v. Romine*, 2 N. M. 114. It is not error to refuse a charge which is not shown to have been asked in writing; as a verbal request should be refused where the statute requires that charges should be in writing: *Myatts v. Bell*, 41 Ala. 222; *Broadbent v. Tuscaloosa etc. Ass'n*, 45 Id. 170.

3. *Modifications, and Charging in Terms of Request.* — Charges not moved for in writing may be qualified without error: *Milner v. Wilson*, 45 Ala. 478. The court may modify such prayers, or reject them altogether, and instruct in its own language, if it chooses, so as to make them conformable to law, and exceptions will not be sustained on account of his refusal to adopt the language of counsel in giving instructions: *Higgins v. Carlton*, 28 Md. 115; S. C., 92 Am. Dec. 666; note to *Peshine v. Shepperson*, 94 Id. 477; note to *Whiteford v. Burckmyer*, 39 Id. 657; on one's right to modify his opponent's prayer for an instruction: *Johnson v. Barber*, 5 Gilm. 425; S. C., 50 Am. Dec. 416; *Walker v. McDowell*, 4 Smedes & M. 118; S. C., 43 Am. Dec. 476; *State v. Ott*, 49 Mo. 326; *Sittig v. Birkestack*, 38 Md. 158; *Budd v. Brooke*, 3 Gill, 198; S. C., 43 Am. Dec. 321; *Hays v. Borders*, 1 Gilm. 46; *Tainter v. Lombard*, 53 Me. 369; S. C., 87 Am. Dec. 552; *Campbell v. Day*, 16 Vt. 558; *Hays v. Paul*, 51 Pa. St. 134; *State v. Wilson*, 2 Scam. 225; *State v. Brantly*, 63 N. C. 518; *Scott v. State*, 1 Ala. Sel. Cas. 23; *Bennett v. Runyon*, 4 Dana, 422; *Boyes v. California Stage Co.*, 25 Cal. 460; *Theobald v. Hare*, 8 B. Mon. 42; *Cotton v. State*, 31 Miss. 504; *Crawford v. Beall*, 21 Md. 208. But a charge should be given in the terms in which it is asked, where it is conformable to law and authorized by the evidence adduced; and in some jurisdictions it is held to be error to refuse a charge asked for, if correct in point of law; or to add thereto a material qualification not required nor authorized by the evidence: *Hardin v. Helton*, 50 Ind. 319; *Clealand v. Walker*, 11 Ala. 1058; S. C., 46 Id. 238; *Walker v. Stetson*, 14 Ohio St. 89; S. C., 84 Am. Dec. 362; *Cotton v. State*, 31 Miss. 504. A general charge upon a point raised is sufficient to substantially comply with the request to charge upon it: *Lycoming Ins. Co. v. Schrefler*, 42 Pa. St. 188; S. C., 82 Am. Dec. 501. The court, however, may decline to notice any request which wants addition or modification to render it appropriate: *Head v. Bridges*, 67 Ga. 227; *City Bank of Macon v. Kent*, 57 Id. 282; *Vaughan v. Porter*, 16 Vt. 286; *Treat v. Lord*, 42 Me. 553; *Ratcliff v.*

Baird, 14 Tex. 43; *Boyce v. California Stage Co.*, 25 Cal. 460. A court is not bound to modify an instruction which is too broad, but may refuse it without giving another of its own motion. The refusal of an instruction, however, is not equivalent to the assertion of a contrary proposition of law: *Dempsey v. Reinsedler*, 22 Mo. App. 43. If a modification is desired or required, a party must call the court's attention to it: *State v. Phinney*, 42 Me. 384. But if a charge is moved for by either party in writing, it must be given or refused in the terms in which it is written. In such cases the court cannot add any oral qualifications without the consent of counsel, and if modifications or qualifications are so added, the judgment will be reversed for such error, if excepted to: *Edgar v. State*, 43 Ala. 45; *Galloway v. McLean*, 2 Dak. 372; *Campbell v. Miller*, 38 Ga. 304; S. C., 95 Am. Dec. 389; *Pate v. Wright*, 30 Ind. 705; S. C., 95 Am. Dec. 705; *Hinton v. Nelms*, 13 Ala. 222; *Heaston v. Cincinnati etc. R. R. Co.*, 16 Ind. 275; S. C., 79 Am. Dec. 431; *Provines v. Heaston*, 67 Ind. 482; *Ray v. Wooters*, 19 Ill. 82; *Kennworthy v. Williams*, 5 Ind. 375; *Clark v. State*, 31 Tex. 575; *Tresca v. Maddox*, 11 La. Ann. 206; S. C., 66 Am. Dec. 198; *Leaptrot v. Robertson*, 44 Ga. 46; *Pugh v. McCarty*, 44 Id. 383; *Dorsett v. Crew*, 1 Col. 18; *People v. Trim*, 37 Cal. 274. If the charge requested, as written, needs qualification, modification, or restriction to render it a correct legal proposition, applicable to the evidence, it should be refused. If the court gives a charge, which it might have refused without error, it cannot afterward add a qualification, however correct in point of law: *Elland v. State*, 52 Ala. 322. In California it is fatal error to give oral instructions to the jury in criminal cases, without the consent of the defendant: See case last cited. In Georgia it has been held that a written request to charge the jury must be applicable to the facts and to law, or the court need not notice it; and that the court may give the charge with verbal modifications; but the whole, taken together, must be correct: *Campbell v. Miller*, 38 Ga. 304; S. C., 95 Am. Dec. 389.

4. *Time for Request and Charge—Demandant's Rights and Duties—Nature of Good Instruction, etc.*—The duty of a party wishing specific instructions is to ask for them, especially to supply omissions, etc.: *Tynan v. Paschal*, 27 Tex. 236; S. C., 84 Am. Dec. 619; *Sidensparker v. Sidensparker*, 52 Me. 481; S. C., 83 Am. Dec. 527; *Borngesser v. Harrison*, 12 Wis. 544; S. C., 78 Am. Dec. 757; and he is entitled to have his request granted or denied, — granted if the instruction is proper; refused if improper: *Plumer v. Gheen*, 3 Hawks, 66; S. C., 14 Am. Dec. 572; *Fletcher v. Howard*, 2 Aik. 115; S. C., 16 Am. Dec. 686; *Taylor v. Hilmyer*, 3 Blackf. 433; S. C., 26 Am. Dec. 430; *James v. Fulcrold*, 5 Tex. 512; S. C., 55 Am. Dec. 743; *Trieber v. Knabe*, 12 Md. 491; S. C., 71 Am. Dec. 607; *Kelitt v. Spencer*, 19 Fla. 748; *Hays v. Paul*, 51 Pa. St. 134; S. C., 88 Am. Dec. 569; *Hocwm v. Weithenick*, 22 Minn. 152; *State v. Ott*, 49 Mo. 326. A party is entitled to a full, fair, and explicit answer to his prayer for instructions, if pertinent: See case last cited; *Galloway v. McLean*, 2 Dak. 372.

It is incumbent on a party seeking an instruction to put it in such clear, precise, and intelligible form as to leave no reasonable ground for misapprehension by the jury as to its correct meaning. Numerous and verbose instructions have a tendency to confuse, rather than to enlighten a jury. A few clear, precise, and intelligent instructions, covering the law of the case, is what should be given to the jury. These should be requested in writing, or be given by the court. General propositions do not enlighten but tend to cloud the minds of the jury. A distinct application of controlling principles to the facts of the particular case is what they need. The asking of volumi-

nous instructions in a simple case not requiring them will be discountenanced: *Mutual etc. Life Ins. Co. v. French*, 2 Cinn. 321; *Fisher v. Stevens*, 16 Ill. 397; *Hocum v. Weitherick*, 22 Minn. 152; *State v. Ott*, 49 Mo. 328; *Ransone v. Christian*, 56 Ga. 351; *Adams v. Smith*, 58 Ill. 417. But in *McCaleb v. Smith*, 22 Iowa, 242, it was held not a good reason for the refusal to give instructions that they were unnecessarily lengthy and numerous, or that they were submitted so late in the cause that they could not be examined without keeping the jury in waiting. There should be time given for the preparation of instructions; and where a charge in writing is requested, and the presiding judge has not time to prepare it during the trial, an adjournment from one afternoon until the next morning, in order to give time for its careful preparation, is not error: *Head v. Bridges*, 67 Ga. 227. Instructions should be filed with the clerk before being read by the court to the jury. And the word "given" or "refused" should be written on the margin of each instruction given or requested. But a failure to comply with the statute is not ground of error, unless excepted to: *Fry v. Tilton*, 11 Neb. 456. It is not a proper mode of requesting instructions to ask the presiding justice "to give proper instructions" upon any particular piece of testimony or fact appearing in the case: *Virgie v. Stetson*, 73 Me. 452; and the practice of singling out in instructions specific acts, and asking the court to say, as a matter of law, that if these acts are established there can be no recovery, is not permissible: *Meyer v. Pacific R. R. Co.*, 45 Mo. 137. A request to charge which is erroneous in part, as embracing too much, is entirely ineffectual: *Hodges v. Cooper*, 43 N. Y. 216. Trial courts have the power, by reasonable and proper rules, to prescribe within what time, during the progress of the trial, instructions must be presented. And this discretionary power is not a subject of review: *Prindeville v. People*, 42 Ill. 217.

In some jurisdictions, the request for instructions must be made before argument, and if not made then, the court need not notice it: *Vaughan v. Porter*, 16 Vt. 266; *Barkman v. State*, 13 Ark. 705; *Harrison v. Young*, 9 Ga. 359; *Firman v. Blood*, 2 Kan. 496. But it is not fatal error for the court to refuse such request if made before argument, and to afterwards give it of its own motion: See same cases. And the giving of an instruction after the close of the argument before the jury, although irregular, is no ground for the reversal of a cause, where the giving of the instruction could work no harm: *Clasbey v. City of St. Louis*, 50 Mo. 89. But the more liberal and better practice is for the court to allow instructions to be requested at any time before the jury retire, and if they are unobjectionable, pertinent to the issue, and necessary for the jury to consider in making up their verdict, they should be given by the court, notwithstanding a rule requiring all instructions to be submitted before the commencement of the argument: *Billings v. McCoy*, 5 Neb. 187; *Crippen v. Hope*, 33 Mich. 344. A rule of court prohibiting a party from obtaining instructions on any point of law relevant in the case, at any time before the jury retire from the bar, ought not to be made, and if made, ought not to be adhered to: *Bell v. North*, 4 Litt. 133. So, with a rule requiring a party who desires written instructions to notify the court of such desire before the trial commences: *Laselle v. Wells*, 17 Ind. 33; *Patterson v. Ball*, 19 Wis. 243. The law gives litigants a right to instructions before the jury retire, and no court can, by its rules, deprive a person of his legal right: *Bell v. North*, 4 Litt. 133. But counsel should submit their requests to charge in time to allow them to be examined by the judge: *Crippen v. Hope*, 33 Mich. 344; *Newton v. Newton*, 12 Ind. 527. They should not be presented as the jury are leaving the jury-box. It is then too late for counsel to make any

specific charge in the case, especially after the jury have been charged: *Tinkham v. Thomas*, 2 Jones & S. 236. So after a court has commenced to instruct a jury orally, it is too late for a party to require instructions to be given in writing: *Boggs v. Clifton*, 17 Ind. 217; *Newton v. Newton*, 12 Id. 527. So where the request is made during the concluding argument to charge the jury in writing, and not within time to permit the court to reduce all its instructions to writing before being called upon to charge the jury, the court does not err in giving to the jury orally such of its instructions as it did not have time to reduce to writing: *Atchison etc. R. R. Co. v. Frankin*, 23 Kan. 74. Requests to charge should be presented in the hearing of opposing counsel: *Tinkham v. Thomas*, 2 Jones & S. 236. If the charge as made omits anything essential, the judge should allow proper requests to be submitted at any time before the jury retire: *Crippen v. Hope*, 38 Mich. 344. Where a case is tried by the court sitting as a jury, it is improper practice to ask instructions, and a judgment will not be reversed for a refusal to grant them: *Clouse v. Maguire*, 17 Mo. 158. There is no law prescribing any particular time at which instructions in criminal cases shall be given: *Gwathin v. Commonwealth*, 9 Leigh, 678; S. C., 33 Am. Dec. 264.

5. *Instructions must be Given when.* — A party has a right to demand instructions, and, if proper, to insist upon them being given in the terms asked: *Clealand v. Walker*, 11 Ala. 1058; S. C., 46 Am. Dec. 238; *Heaton v. Cincinnati etc. R. R. Co.*, 16 Ind. 275; S. C., 79 Am. Dec. 430; *Pate v. Wright*, 30 Ind. 476; *Clark v. State*, 31 Tex. 574; *State v. Wilson*, 2 Scam. 225; *Hinton v. Nelms*, 13 Ala. 222; and the charge of the court must be in writing, if either party objects to its being verbal: See same cases. Where the charge requested is appropriate to the evidence, and conformable to law, it is error for the court to fail or refuse to give it in the language requested: *Cole v. Spann*, 13 Id. 537; *Clealand v. Walker*, 11 Id. 1058; S. C., 46 Am. Dec. 238; *Washburn v. Tracy*, 2 D. Chip. 128; S. C., 15 Am. Dec. 661; *Shewmake v. Jones's Etc's*, 37 Ga. 102; *Ivey v. Phifer*, 11 Ala. 535; *Norwood v. Boon*, 21 Tex. 592; *Davis v. State*, 10 Ga. 101; *Galt v. Jackson*, 9 Id. 151; *Baltimore etc. R. R. Co. v. Lafferty*, 14 Gratt. 478; *Zabriske v. Smith*, 13 N. Y. 322; *Hays v. Borders*, 1 Gilm. 46; *Earle v. Thomas*, 14 Tex. 583; *Owings v. Trotter*, 1 Bibb, 158; *People v. Taylor*, 36 Cal. 255; *Cotton v. State*, 31 Miss. 504; *Briggs v. Town of Georgia*, 12 Vt. 60; *Baltimore etc. R. R. Co. v. Polly*, 14 Gratt. 447; *Peshine v. Shepperson*, 17 Id. 473; and its refusal cannot be excused by giving other charges of equivalent import, either at the time of request or subsequently: *Ivey v. Phifer*, 11 Ala. 535; *Hinton v. Nelms*, 13 Id. 222; though in some cases it is sufficient if the court substantially complies with the request by giving the substance of the special instructions asked: *Patterson v. McLeer*, 90 N. C. 493; *Dodge v. Rogers*, 9 Minn. 223; *Fay v. O'Neill*, 36 N. Y. 11; *Sherman v. Wakeman*, 11 Barb. 254; *Marshall v. Flinn*, 4 Jones, 199; *Williams v. Birch*, 6 Bosw. 299. In preparing instructions, each party may assume any reasonable hypothesis in relation to the facts of the case, and ask the court to declare the law as applicable to it; and it is error to refuse an instruction so framed because the case supposed does not include some other hypothesis equally rational. Every instruction which correctly declares the law applicable to the case which it supposes, if the case can be rationally inferred from the testimony, should be given: *People v. Taylor*, 36 Cal. 255. And though an instruction as asked is not wholly correct, yet if the general refusal of it may mislead the jury, the court should accompany the refusal with an explanation to the jury, or should give them an instruction stating the correct proposition: *Peshine v. Shepperson*, 17 Gratt. 472; *Baltimore etc. R. R. Co. v. Polly*, 14 Id. 447.

In all cases either party may ask instructions as to the legal effect of the evidence introduced, or of any particular circumstance which may be offered to the jury, and from which the particular matter in controversy is to be deduced: *Union Bank v. Kerr*, 7 Md. 88; *Nailor v. Bowie*, 3 Id. 251; *Inloes v. American Ex. Bank*, 11 Id. 173; as upon failure of plaintiff's proof, defendant may ask an instruction that the evidence was not legally sufficient to maintain an action: *Nailor v. Bowie*, 3 Id. 251; and a party may ask the direction of the court upon the effect of testimony in a case, whether that testimony be offered subject to all objection as to its admissibility and effect or not: *Inloes v. American Ex. Bank*, 11 Id. 173. In Maryland, it is held that a party has the right to segregate any portion of the facts of a case from the whole body, and ask the instruction of the court upon them; and that it is for the other party, if he desires it, to ask the opinion of the court on the whole testimony: *Day v. Day*, 4 Id. 262; but see *Meyer v. Pacific R. R. Co.*, 45 Mo. 137, cited *supra*, in subdivision 4. If there be any evidence introduced tending to prove a fact relied upon by a party to a suit, it is error to refuse instructions putting that fact to the jury: *Ridens v. Ridens*, 29 Id. 470; *Smith v. Johnson*, 13 Ind. 224; *Gilkey v. Peeler*, 22 Tex. 663.

6. *Instructions should be Refused when.*—Conflicting, indefinite, ambiguous, or misleading instructions should not be given, and it is not error for the court to refuse to do so: *Loeb v. Weis*, 64 Ind. 286; *Stockton v. Frey*, 4 Gill, 406; S. C., 45 Am. Dec. 138; *Pomroy v. Parmlee*, 9 Iowa, 140; S. C., 74 Am. Dec. 328; *White v. Thomas*, 12 Ohio St. 312; S. C., 80 Am. Dec. 347; *Southern R. R. Co. v. Kendrick*, 40 Miss. 374; S. C., 90 Am. Dec. 332; *State v. Benham*, 23 Iowa, 154; S. C., 92 Am. Dec. 417; *Briggs v. Town of Georgia*, 12 Vt. 60. So the refusal of instructions is not error when they are asked upon immaterial issues; and such refusal is no ground for new trial or reversal: *Pomroy v. Parmlee*, 9 Iowa, 140; S. C., 74 Am. Dec. 328; *Jewett v. Lincoln*, 14 Me. 116; S. C., 31 Am. Dec. 36; *Whidden v. Seelye*, 40 Me. 247; S. C., 63 Am. Dec. 661; *Conger v. Dean*, 3 Iowa, 463; S. C., 66 Am. Dec. 93; *Treat v. Lord*, 42 Me. 552; S. C., 66 Am. Dec. 298; *State v. Shippey*, 10 Minn. 223; S. C., 68 Am. Dec. 70. Such instructions, though wrong, are of no avail to a party excepting: *Whidden v. Seelye*, 40 Me. 247; S. C., 63 Am. Dec. 661. So a court is not bound to give instructions if there is no evidence for a finding. A prayer not based on evidence should be refused: See notes to *Blankenship v. Douglas*, 82 Am. Dec. 613; *Conger v. Dean*, 66 Id. 96; *Breese v. State*, 80 Id. 347; *Harvey v. Thomas*, 10 Watts, 63; S. C., 36 Am. Dec. 141, note 144; *Haines v. Stauffer*, 13 Pa. St. 541; S. C., 53 Am. Dec. 493; *Farish v. Reigle*, 11 Gratt. 697; S. C., 62 Am. Dec. 666; *Johnson v. Jennings*, 10 Gratt. 1; S. C., 60 Am. Dec. 323; *Duggins v. Watson*, 15 Ark. 118; S. C., 60 Am. Dec. 560; *Andre v. Bodman*, 13 Md. 628; S. C., 71 Am. Dec. 628; *Cooke v. England*, 27 Md. 14; S. C., 92 Am. Dec. 618; *Wright v. Welch*, 3 McAr. 479; *Brown v. State*, 28 Ga. 199; *Earls v. Thomas*, 14 Tex. 583. So instructions based on rejected testimony are properly refused: *Pleasants v. Scott*, 21 Ark. 370. So may instructions be refused, where they need to be qualified or explained to prevent the jury from being misled: *Swallow v. State*, 22 Ala. 20; *Godbold v. Blair*, 27 Id. 592; *Dunlap v. Robinson*, 28 Id. 100; *Hall v. Hunter*, 4 G. Greene, 539; *Rolston v. Langdon*, 26 Ala. 680; or where they have already been given in substance: *McGonigle v. Daugherty*, 71 Mo. 259; *Taber v. Hutson*, 5 Ind. 322; S. C., 61 Am. Dec. 96; *Abrams v. Foshee*, 3 Iowa, 274; S. C., 66 Am. Dec. 77; *Raver v. Webster*, 3 Iowa, 502; S. C., 66 Am. Dec. 96; *Pettigrew v. Barnum*, 11 Md. 424; S. C., 69 Am. Dec. 212; *McCown v. Schrimpf*, 21 Tex. 22; S. C., 73 Am. Dec. 221; *People v. King*, 27 Cal. 507; S. C., 87 Am. Dec. 95. And it is not

error for a court to refuse to repeat its instructions in different language, but the same in substance, after they have once been given: *Helbrook v. Utica etc. R. R. Co.*, 12 N. Y. 236; S. C., 64 Am. Dec. 502; *Haly v. Merkel*, 44 Ill. 225; S. C., 92 Am. Dec. 182; *People v. O'Connell*, 62 How. Pr. 436; *Hocum v. Weitherick*, 22 Minn. 152; *Wright v. Ames*, 28 Id. 362; *McGonigle v. Daugherty*, 71 Mo. 259; *Lloyd v. Moore*, 38 Ohio St. 97. Particularly if the charge, or a part of it, was wrong at first: See case last cited. So a charge may be refused without error if it is not applicable to the case: *Hall v. Hunter*, 4 G. Green, 539; or some point therein: *Miles v. Myers*, Walker, 379; or is requested in the alternative, when one of the alternatives is erroneous, although the other may be correct: *Berry v. Griffin*, 10 Md. 27; S. C., 69 Am. Dec. 123; or where the prayer involves a complicated statement which it would be difficult for the jury to understand: *Whiteford v. Burckmyer*, 1 Gill, 127; S. C., 39 Am. Dec. 640; or is otherwise improper: *Owings v. Trotter*, 1 Bibb, 158. A request to charge that one of several matters constitutes a good defense, where each would not do, may be disregarded by the judge: *Bowman v. Teall*, 23 Wend. 306; S. C., 35 Am. Dec. 562.

Where the evidence is conflicting on a question of fact material to the defense, the plaintiff is not entitled to a charge asserting his right to a recovery on the whole evidence: *Woolfork v. Sullivan*, 23 Ala. 548; *Bernhard v. Brunner*, 4 Bow. 528. If a charge is asked which admits of two constructions, one of which is calculated to confuse and mislead the jury, it may be refused: *Rolston v. Langdon*, 26 Ala. 660. If the evidence in a criminal case is conflicting, the defendant has no ground of exception to the refusal of the judge to instruct the jury that, if they believe the defendant's testimony, they should acquit him: *Commonwealth v. Broadbeck*, 124 Mass. 319. So a long string of instructions, loaded with words, running into each other, involved in intricacies, and requiring as much elucidation as the facts of the case themselves, may properly be refused: *State v. Mize*, 15 Mo. 153; *State v. Floyd*, 15 Id. 349; *Lowry v. Beckner*, 5 B. Mon. 42. In Iowa, the practice of giving instructions to the jury, as framed by counsel, was condemned in *State v. Collins*, 20 Iowa, 85, where the court said that the better practice, as a general rule, was for the judge to put aside the instructions asked by the respective counsel, and cover the whole ground of the controversy in a corrected and methodical charge of its own, stating the questions of fact to be decided, and the law applicable thereto, under the issues and the evidence. Where the judge wrote upon the margin of the first of several sheets of paper fastened together, and containing instructions asked: "Instructions 1 to 7 all refused," and signed the same, it was held to be in substantial compliance with the statute, requiring the court to write on the margin of each instruction not given the word "refused": *Harvey v. Tama Co.*, 53 Iowa, 228.

A party has no right to ask a new and substantive charge to the jury, on their return into court, before verdict, for further instructions, or for an explanation of the charge previously given, or for the purpose of having it again repeated. The court will not instruct the jury, under such circumstances, upon the motion of either of the parties: *Prosser v. Henderson*, 11 Ala. 484; *Turner v. Foxall*, 2 Cranch C. C. 324; *Forrest v. Hanson*, 1 Id. 63; but it is not error for the court, at the jury's request, to give further information or explanation in open court, when counsel are present: *Foster v. Turner*, 31 Kan. 58. It is improper, however, to give any instruction to the jury, after they have retired, upon any question not asked by the jury: *State v. Brown*, 12 Minn. 538; *United States v. White*, 5 Cranch C. C. 116; *Turner v. Foxall*, 2 Cr. Ct. 324; *Forrest v. Hanson*, 1 Id. 63; *State v. Pitts*, 11 Iowa, 343; or to

give them, even upon request, another full, complete, and different charge upon material questions involved in the issue of the case: *Foster v. Turner*, 31 Kan. 58. But in Georgia it is error to refuse counsel's request for a proper instruction, upon a point not charged by the court, when the jury return seeking further instructions, and such point is proper for them to consider: *Yeldell v. Shinkholster*, 15 Ga. 189. It is not error for the court below to refuse verbal instructions asked by counsel, if the court correctly give the law upon all the points arising in the case: *Crisman v. McDonald*, 28 Ark. 8. If a charge asked embraces several different propositions, some of which are good and some bad, the court may refuse the whole without error, and an appellate court will not consider an exception to the refusal to give the charge in gross: *Magee v. Badger*, 34 N. Y. 247; S. C., 90 Am. Dec. 691, note 695; *Preston v. Leighton*, 6 Md. 88; *Beaver v. Taylor*, 93 U. S. 46; but in West Virginia the good is severed from the bad in such cases, and given to the jury: *Peshine v. Shepperson*, 17 Gratt. 472; S. C., 94 Am. Dec. 468.

7. *New Trial—Reversal of Judgment—Erroneous and Harmless Instructions.*—A new trial will be granted where instructions given were conflicting: *Pomroy v. Parmlee*, 9 Iowa, 140; S. C., 74 Am. Dec. 328. While the refusal of proper instructions, or the giving of improper ones, will not always occasion a reversal of the judgment, yet that is when substantial justice has been done, and the instructions were not of such a character as would tend to mislead the jury on the doubtful facts in the case. The general rule is, that if the instructions are objectionable, and the natural effect would be to mislead the jury where the facts are controverted, the verdict will be set aside, and a new trial awarded: *Adams v. Smith*, 58 Ill. 417; *Kent v. Lawson*, 12 Ind. 675; S. C., 74 Am. Dec. 233. If the instruction is such that the ground upon which the verdict was rendered cannot be ascertained, the verdict must be set aside: *Holmes v. Doane*, 9 Cush. 135. So where the plaintiff seeks to recover upon a double ground, and it is not known upon which ground a verdict was found for him, the appellate court will grant the defendant a new trial for misdirection in matter of law touching either ground of liability: *Gill v. Read*, 5 R. I. 343; S. C., 73 Am. Dec. 73. But instructions irrelevant to the issue do not *per se* authorize a new trial: *Cannon v. Alsbury*, 1 A. K. Marsh. 76. Where error of court in charging the jury, or refusing to charge it, does no injury, as where it could not have altered the verdict, it is not a ground for a new trial: *Nicholson v. New York etc. R. R. Co.*, 22 Conn. 74; S. C., 56 Am. Dec. 390; *Western Stage Co. v. Walker*, 2 Iowa, 504; S. C., 65 Am. Dec. 789; *Ross v. Bank of Burlington*, 1 Aik. 43; S. C., 15 Am. Dec. 664; *Jewett v. Lincoln*, 14 Me. 116; S. C., 31 Am. Dec. 36; *Leaptrot v. Robertson*, 44 Ga. 46; *Union Bank etc. v. Planters' Bank*, 9 Gill & J. 439; S. C., 31 Am. Dec. 173; *Chase v. Washburn*, 1 Ohio St. 244; S. C., 59 Am. Dec. 623; *Gunn's Adm'r v. Todd*, 21 Mo. 303; S. C., 64 Am. Dec. 231; *Hardy v. Colby*, 42 Me. 381. But a new trial will be granted, although the party against whom erroneous instructions were given obtains a verdict, if the law was so erroneously stated that the defendant might thereby have been prevented from making his full defense: *Clarke v. Diggs*, 6 Ired. 159; S. C., 44 Am. Dec. 73. Where the verdict is right and the instructions wrong, it is not ground for a new trial that the jury disregarded erroneous instructions: *Armstrong v. Keith*, 3 J. J. Marsh. 153; S. C., 20 Am. Dec. 131; *Wellborn v. Weaver*, 17 Ga. 267; S. C., 63 Am. Dec. 235; *Peck v. Land*, 2 Ga. 1; S. C., 46 Am. Dec. 368; *Trecca v. Maddox*, 11 La. Ann. 206; S. C., 66 Am. Dec. 198; *Commonwealth v. Van Tuyl*, 1 Met. 1; S. C., 71 Am. Dec. 455; but there are cases holding that the jury must receive the law from the court, and act according to

dict by the court, so that they may be seen by counsel: *Leighton v. Sargent*, 31 N. H. 119; S. C., 64 Am. Dec. 323; *Shapley v. White*, 6 N. H. 172. Instructions to the jury should always be given in open court: *O'Connor v. Guthrie*, 11 Iowa, 80; and it is not error to permit the jury to take the written instructions of the court with them when they retire to consider upon their verdict, provided they take the whole of them: *Head v. Langworthy*, 15 Id. 235; *Dixon v. State*, 13 Fla. 636; and they may take a written instruction asked, but refused: *Langworthy v. Connelly*, 14 Neb. 340; S. C., 45 Am. Rep. 117. The court may overrule an improper instruction asked without giving any instruction upon the points of law involved: *Owings v. Trotter*, 1 Bibb, 158. The effect of an erroneous instruction may be cured by correct accompanying ones: *Benson v. Atwood*, 13 Md. 20; S. C., 71 Am. Dec. 611; *Wood v. Chambers*, 20 Tex. 247; S. C., 70 Am. Dec. 382; *Smarr v. State*, 88 Ind. 504. In Indiana, it is held that an erroneous instruction is not cured by the subsequent giving of a correct one, unless the former be withdrawn; but where the court substitutes and reads to the jury another series of instructions for the series first read, in which substituted series the error is corrected, this fact is equivalent to a withdrawal of the first series: *McCrory v. Anderson*, 103 Id. 12. Where a party requests a written instruction, but does not write it out himself, the judge may dictate it to the attorney, and the latter must reduce it to writing. It is not necessary for the judge to do it with his own hands: *Barkman v. State*, 13 Ark. 706. A party cannot complain if the instructions given were correct, covered the whole ground of the case, and his were not given, though correct: *Baltimore etc. R. R. Co. v. Worthington*, 21 Md. 275; S. C., 83 Am. Dec. 578, note 589; *Pettigrew v. Barnum*, 11 Md. 434; S. C., 69 Am. Dec. 212, note 226; *New York Life Ins. Co. v. Flack*, 3 Md. 341; S. C., 56 Am. Dec. 742, note 755; *Hurst v. Robinson*, 13 Mo. 82; S. C., 53 Am. Dec. 134, note 337.

9. *Exceptions and Objections — Insufficiency of General Exceptions — Necessity for Specific Objections — What Record must Show — Presumptions, etc.* — A party complaining of error in the giving or refusal of instructions, or an omission to give them, must affirmatively show it: *Donnell v. Jones*, 17 Ala. 689; S. C., 52 Am. Dec. 194; *Conger v. Dean*, 3 Iowa, 463; S. C., 66 Am. Dec. 93; as that there was evidence to which an instruction refused was applicable, etc.: *Marquis v. Rogers*, 8 Blackf. 118. But no exception lies to an instruction favorable to the party complaining: *Harris v. Pierce*, 6 Ind. 162; *Commonwealth v. Gill*, 14 B. Mon. 20; *Bosley v. Chesapeake Ins. Co.*, 3 Gill & J. 450; *Neddy v. State's Lessee*, 8 Yerg. 248. Objections to instructions come too late, as a general rule, if first made in the appellate court: *Lanham v. Commonwealth*, 3 Bush, 528; *Daily v. Nuttman*, 14 Ind. 339; *Fleming v. Potter*, 14 Id. 486; *Stewart v. Harper*, 16 La. Ann. 181. Thus an objection that instructions were not reduced to writing comes too late in the appellate court when the law does not require the court to reduce its charges to writing, unless requested to do so by a party, and no such request was made, and no objection interposed: *Taber v. Hutson*, 5 Ind. 322; S. C., 61 Am. Dec. 96. In Texas, however, though an objection to a criminal charge in cases above the grade of misdemeanors be first taken in the appellate court, that court will reverse the judgment if the instruction related to a material matter, prejudiced the defendant's rights, and was calculated to mislead the jury: *Bishop v. State*, 43 Tex. 390; *Haynes v. State*, 2 Tex. App. 84; *Mace v. State*, 9 Id. 110; *Thatcher v. Mills*, 14 Tex. 13; S. C., 65 Am. Dec. 95. So in New York: *People v. McCann*, 16 N. Y. 58; S. C., 69 Am. Dec. 642. But even in those courts a party who makes his objection to judicial action prejudicial to him at the proper

time is entitled to have his objection more favorably considered than if it had been inopportunately delayed: *Bishop v. State*, 43 Tex. 390. The general rule, however, is, that error in omitting to give instructions, or in giving or refusing them, unless excepted to, is not available on error or appeal to the complaining party, and will not be noticed in the appellate court: *Martin v. People*, 13 Ill. 341; *Buckmaster v. Cool*, 12 Id. 74; *Steinman v. Toliver*, 13 Mo. 590; *Lobdell v. Hall*, 3 Nev. 507; *Krack v. Wolf*, 20 Ind. 88; *Thatcher v. Mills*, 14 Tex. 13; S. C., 65 Am. Dec. 95; *Price v. State*, 36 Miss. 531; S. C., 72 Am. Dec. 195; *Eason v. Gester*, 31 Iowa, 475; even where there is no necessity of a motion for a new trial: See case last cited. The same rule applies where a party demands that instructions be reduced to writing, if the court gives them orally. An exception must be taken, or the error is waived: *Heaton v. Olmicknati etc. R. R. Co.*, 16 Ind. 275; S. C., 79 Am. Dec. 430. A failure to except to the refusal of such demand, or to the giving or refusing to give instructions before the jury retire, is considered an approval of the judicial action: *Evans v. Burlington etc. R. R. Co.*, 21 Iowa, 374. A failure to give instructions is not a subject of exception, unless they were requested, refused, and an exception taken to such refusal: *Moore v. Fitchburg R. R. Corp.*, 4 Gray, 465; S. C., 64 Am. Dec. 83. In some cases, the giving of an erroneous instruction, not excepted to, cannot be assigned as a ground for a new trial: *Beals v. Beals*, 20 Ind. 163. So a refusal to give instructions is not assignable as error, where there was no motion for a new trial on that ground: *Fleming v. Potter*, 14 Id. 486.

In New York, it has been held that, upon a motion for a new trial upon a case made for the misdirection of the judge in his charge to the jury, it is not necessary that the charge should be excepted to. On a bill of exceptions, the rule is otherwise: *Geer v. Archer*, 2 Barb. 420; *Archer v. Hubbell*, 4 Wend. 514; but see *Raymond v. Howland*, 17 Id. 389. Instructions not excepted to, but which appear from the record to have been given or refused, are open for consideration, under the statute of Mississippi, on motion for a new trial: *Mayer v. McLure*, 36 Miss. 389; S. C., 72 Am. Dec. 190. Under the Nevada practice, if an exception is actually taken at the trial, but not drawn up in form for the judge's signature, and no note of it is made either by the judge or the clerk, still the party dissatisfied with the judgment has a right to make his statement on motion for new trial, or on appeal, and in either of such statements he may show an exception that he really took during the trial, although there be no note of the same: *Lobdell v. Hall*, 3 Nev. 507. On appeal, the presumption is in favor of the instructions given to the jury in the court below in every particular not excepted to, and spread upon the record: *Raymond v. Howland*, 17 Wend. 389; *Sidensparker v. Sidensparker*, 52 Me. 481; S. C., 83 Am. Dec. 527; *State v. Shippey*, 10 Minn. 223; S. C., 88 Am. Dec. 70; *Woodruff v. Garner*, 27 Ind. 4; S. C., 89 Am. Dec. 477; *Gregory v. Allen*, Mart. & Y. 74; *White v. Jordan*, 27 Me. 370; *Boggs v. Clifton*, 17 Ind. 217; *Lobdell v. Hall*, 3 Nev. 507. The action of the court below in omitting instructions, or in granting or refusing them, will, in an appellate court, be presumed correct, unless the error objected to appears of record, and enough of the evidence is stated to support the objection: *Newton v. Newton*, 12 Ind. 527; *Higgins v. Carlton*, 28 Md. 115; S. C., 92 Am. Dec. 666; *Childs v. McChesney*, 20 Iowa, 431; S. C., 89 Am. Dec. 545. note to *People v. King*, 87 Id. 101; *Graves v. State*, 12 Wis. 591; *Dann v. Cudney*, 13 Mich. 239; S. C., 87 Am. Dec. 755; *Price v. State*, 36 Miss. 531; S. C., 72 Am. Dec. 195; *Fitzhugh's Ex'r v. Fitzhugh*, 11 Gratt. 300; S. C., 62 Am. Dec. 668; *Britt v. Aylett*, 11 Ark. 475; S. C.,

52 Am. Dec. 282; *Blue v. Kibby*, 1 T. B. Mon. 195; S. C., 15 Am. Dec. 95; *Buckmaster v. Cool*, 12 Ill. 74; *Lobdell v. Hall*, 3 Nev. 507; *People v. Trim*, 37 Cal. 274; *Potter v. Wooster*, 10 Iowa, 334; *Giles v. Fauntleroy*, 13 Md. 126; *Peden v. Moore*, 1 Stew. & P. 71; S. C., 21 Am. Dec. 649; but on exceptions to instructions actually given on the ground of errors of law, no testimony need be stated: See case last cited. The appellate court must have the evidence to enable it to determine whether any error has been committed: See same cases. A judgment will be reversed for the giving of an erroneous instruction, if the bill of exceptions, though not purporting to contain all the evidence, contains enough to show that the instruction was material: *Humphrey v. Taylor*, 45 Wis. 251. If, as a whole, the charge is calculated to mislead the jury, there is error in the record; if not, there is none: *Reeves v. Delaware etc. R. R. Co.*, 30 Pa. St. 454; S. C., 72 Am. Dec. 713. One objecting to an instruction, that it is not a full statement of law applicable to the case, cannot make such objection in the supreme court by excepting to the instruction given; he must ask the trial court for an additional instruction to supply the supposed omissions in the one given, and if such additional instruction is refused, he must see that it, as well as the one given, is made part of the record in one of the modes prescribed by law: *Adams v. Stringer*, 78 Ind. 175. Instructions asked for and refused by the court cannot be made a part of the record of a cause by merely copying them in the motion for a new trial: *Id.*

If all the evidence is not set out in the bill of exceptions, a charge of the court, which is excepted to, will be presumed to have been warranted by the proof. So, also, where a charge is refused, it will be presumed, if necessary to support the ruling of the court below, that the charge was improper, the bill of exceptions not showing to the contrary. Error must affirmatively be made to appear in such a case: *Lyman v. State*, 47 Ala. 686; *Wise v. Postlewait*, 3 W. Va. 452. Compare *Duggins v. Watson*, 15 Ark. 118; S. C., 60 Am. Dec. 560. Unless an instruction given to the jury is manifestly erroneous under any and every conceivable state of facts, it will be presumed to be correct, unless it is proved incorrect by the party objecting to it, or from the statement of facts, or bill of exceptions: *People v. King*, 27 Cal. 507; S. C., 87 Am. Dec. 95. Charges which the record fails to show were moved for in writing will be presumed to have been asked orally: *Milner v. Wilson*, 45 Ala. 478. Compare *Myatts v. Bell*, 41 Id. 222; *English's Ex'r v. McNair's Adm'rs*, 24 Id. 40. One who excepts to a charge to the jury, or to an omission to charge, or to a refusal to charge, must do so at the trial, when the act objected to is done, and before the jury leave the bar; and he should have the record show the objection: *Thatcher v. Mills*, 14 Tex. 13; *City Council etc. v. Gilmer*, 33 Ala. 116; S. C., 70 Am. Dec. 562; *Martin v. People*, 13 Ill. 341; *Houston v. Lane*, 39 Mo. 495; *Higgins v. Carlton*, 28 Md. 115; S. C., 92 Am. Dec. 666; *Taylor v. Randall*, 3 Col. 399. Exceptions to instructions are too late after verdict: See case last cited; and they cannot be made upon a motion for a new trial: *Houston v. Lane*, 39 Mo. 495; *Harrison v. Chappell*, 84 N. C. 258; *Vamoy v. State*, 41 Tex. 639; *Anderson v. Hill*, 12 Smedes & M. 679; S. C., 51 Am. Dec. 130; *Parker v. Flagg*, 26 Me. 181; S. C., 45 Am. Dec. 101. In some courts a more liberal practice prevails, and the exceptions to instructions may be indicated as soon as the jury retire; and the exceptions so indicated may be reduced to writing, and signed by the judge at any time during the term: *Jones v. Thurmond*, 5 Tex. 318. Again, the proper method of raising questions as to the correctness of the charge of the court to the jury to be considered on appeal is by asking specific instructions

upon the points involved, or by specific exceptions to the instructions given, so as to call the attention of the court to the precise point of objection: *Tomlinson v. Wallace*, 16 Wis. 224; *Kellogg v. Chicago etc. R'y Co.*, 26 Id. 286, and cases there cited; *Schmale v. Hausman*, 7 N. Y. C. P. 414; *Dickey v. Malecki*, 6 Mo. 177; S. C., 34 Am. Dec. 130; *Selleck v. Sugar Hollow etc. Co.*, 13 Conn. 453; *Sipe v. Sipe*, 14 Ind. 477; *McReady v. Rogers*, 1 Neb. 124; S. C., 93 Am. Dec. 333, note 337; *Coons v. Remick*, 11 Tex. 134; S. C., 60 Am. Dec. 230.

It is a well-settled rule that a general exception to a charge containing two or more distinct legal propositions is unavailing, if either of the propositions is correct. A general exception to the whole of such a charge is insufficient on appeal, unless the whole charge is wrong. If any one of the propositions is correct, a general exception to the whole of them fails, and will be overruled even in the primary court. Stated in another form, exceptions to instructions must be specific, or the instructions will not be reviewed, and if excepted to as a whole, all must be affirmed, if one is found correct: *Hepburn v. Montgomery*, 5 N. Y. C. P. 250, and numerous New York cases there cited; *Cooper v. Schlesinger*, 111 U. S. 148; *Mobile etc. R'y Co. v. Jurey*, 111 Id. 584; *Sasford v. Crocheron*, 8 N. Y. C. P. 146; *Haggart v. Morgan*, 5 N. Y. 422; S. C., 55 Am. Dec. 350, note 354; *Tomlinson v. Wallace*, 16 Wis. 224; *McReady v. Rogers*, 1 Neb. 124; S. C., 93 Am. Dec. 333, note 337; *Mihocakes etc. R. R. Co. v. Hunter*, 11 Wis. 160; S. C., 78 Am. Dec. 699; *Hart v. Rensselaer etc. R. R. Co.*, 8 N. Y. 37; S. C., 59 Am. Dec. 447; *Dickey v. Malecki*, 6 Mo. 177; S. C., 34 Am. Dec. 130; *Beall v. Territory*, 1 N. M. 507; *Benson v. Lundy*, 52 Iowa, 265; *Casswell v. Fellows*, 110 Mass. 52; *Macintosh v. Bartlett*, 67 Me. 130; *Kansas Pacific R'y Co. v. Nichols*, 9 Kan. 235; *Board of Water Commissioners v. Burr*, 3 Jones & S. 522; *Hamlin v. Haight*, 32 Wis. 237; *Walsh v. Kelly*, 40 N. Y. 556; *Butcher's Melting Ass'n v. Commercial Bank*, 2 Disn. 46; *Brassell v. State*, 64 Ga. 318; *Ivey v. Coleman*, 42 Ala. 409; *Fullenwider v. Ewing*, 25 Kan. 69; *State v. Pike*, 65 Me. 111; *John D. C. v. State*, 16 Fla. 554; *Crisman v. McDonald*, 28 Ark. 8; *Beaver v. Taylor*, 93 U. S. 46; *Galloway v. McLean*, 2 Dak. 372; *Bard v. Elston*, 31 Kan. 274; *Norton v. Livingston*, 14 S. C. 177; *Dean v. Chicago etc. R'y Co.*, 43 Wis. 305. The same rule applies to a general exception by one party to the giving of instructions asked by the other, where they embrace several propositions of law, any one of which is not erroneous. A general exception in such a case presents no question for review: *Davenport Gas Light etc. Co. v. City of Davenport*, 13 Iowa, 229. Where the court, at the request of the defendant, gave to the jury five or more separate and distinct instructions, and the record showed that the plaintiff excepted to these instructions in the following form: "To the giving of which said instructions as asked by the defendant, and to the refusal of said court to charge said jury as requested by the plaintiff, the plaintiff then and there duly excepted and excepts," it was held one general exception, and insufficient: *Bard v. Elston*, 31 Kan. 274. An exception to an instruction, filed after verdict, specifying that it "misdirected the jury in a matter of law," is too general, and will not be considered: *Benson v. Lundy*, 52 Iowa, 265. An exception "to the charge as given, and to each and every part thereof," and to "every line, sentence, and paragraph of the same," will not be sustained where any portion of the charge is correct: *Danielson v. Dyckman*, 26 Mich. 169. An exception which is "so particular in pointing at everything that it specifies nothing, is about equivalent to a general objection to the judge's charging at all": Id. A general exception of record "to each and every portion" of a general charge, embracing several legal proposi-

tions, is held insufficient in Wisconsin, unless the whole charge is erroneous: *Hamlin v. Haight*, 32 Wis. 237; *Dean v. Chicago etc. R'y Co.*, 43 Id. 305; but in Iowa the exceptor is entitled, on appeal, to present his objections to any of the instructions, though he admitted that some of them were correct: *Eikenberry v. Edwards*, 67 Id. 14; and in Kansas it will be presumed that exceptions were duly taken to each and every portion of the charge separately, and that they are correct: *Kansas etc. R'y Co. v. Nichols*, 9 Kan. 235; *Bard v. Elston*, 31 Id. 274. In Indiana, where a party requests the jury to be charged in writing, and in disregard of such request the judge gives verbal instructions and explanations, a general exception is sufficient to review the judicial action, where the party excepted to all the instructions, and said that all included each: *Sutherland v. Venard*, 34 Ind. 390. So in Iowa, a general exception to the refusal of the court to give instructions asked is sufficient: *Harvey v. Tama Co.*, 53 Iowa, 228; where such refusal is noted on the margin of each instruction: *Davenport Gas etc. Co. v. City of Davenport*, 13 Id. 229; but in Wisconsin, an exception "to the refusal of the court to give the written instructions asked for by defendant" is insufficient, unless all the instructions asked were correct: *Hamlin v. Haight*, 32 Wis. 237.

If a bill of exceptions states that a party requested the judge to grant certain requests for instructions, and that the judge declined to give the instructions requested, but gave full and appropriate instructions not excepted to, and omits to state what these instructions were, there is no ground of exception, unless the party had the right to have the instructions given without modification or qualification: *Woods v. Woods*, 127 Mass. 141. Where a party excepts to a refusal to give an instruction as asked, but not to the giving of the same as modified, and the ruling of the court is not urged as a ground for a new trial, nor assigned for error in the appellate court, the only question before that court will be, whether the trial court erred in refusing the instruction as asked: *Chicago City R'y Co. v. Mumford*, 97 Ill. 560. In California, an objection to an oral charge to a jury should specifically point out in what the objection consists: *Sill v. Reese*, 47 Cal. 294; so an exception to the charge given by the court of its own motion must specify the proposition which is deemed objectionable: *Shea v. Potrero etc. R. R. Co.*, 44 Id. 414; but when a party procures the court to give to the jury instructions which contain legal propositions, it is sufficient for the other party, in his exception, to say generally that he excepts to each and all of the instructions, without specifying the objectionable part: *McCreery v. Everding*, 44 Id. 246; *Shea v. Potrero etc. R. R. Co.*, 44 Id. 414. It is sufficient in the specification made in the statement on motion for a new trial, of reasons why a new trial should be granted, to assign errors in law occurring by "giving each of the instructions asked by the defendants." Such specification sufficiently points out the particular errors in the instructions relied on: *McCreery v. Everding*, 44 Id. 246. It is improper, on appeal, to point out a single instruction, and claim it to be objectionable of itself, but all the instructions must be considered together: *Nickles v. Wells*, 2 Utah, 167; *People v. Sensabaugh*, 2 Id. 473; *Williams v. Vanmeter*, 8 Mo. 339; S. C., 41 Am. Dec. 644. Instructions should be identified by making them a part of the record by an order of court, or they should form part of the bill of exceptions signed by the court. The proper mode is to include them in the bill of exceptions signed by the judge, and where the errors complained of should be plainly and distinctly set forth: *Forest v. Crenshaw*, 81 Ky. 51; *Brown v. State*, 28 Ga. 199; *Potter v. Wooster*, 10 Iowa, 334. Instructions to the jury, which have not been filed or directed by the court to be made part of the record, and which are

not in any proper bill of exceptions, are [not a part of the record: *Aufdenkamp v. Smith*, 96 Ind. 328. The office of a bill of exceptions is to bring up for review questions of law made and decided on the trial: See note to *Freeman v. People*, 47 Am. Dec. 238; and law of bills of exception in criminal cases is the same as in civil: *Shorter v. People*, 2 N. Y. 193; S. C., 51 Am. Dec. 286. Motions and instructions are no part of the record, and can only be made part of it by being incorporated bodily in a bill of exceptions. If not so incorporated, they cannot be noticed by the appellate court. A mere reference to them in the bill, by citing the page of the transcript on which they appear, is insufficient: *Jefferson City v. Opel*, 67 Mo. 394. And the motion for a new trial must be incorporated in the bill of exceptions: *Robinson v. Hood*, 67 Id. 660. Where a writ of error brings up a formal bill of exceptions, a court of error is strictly to confine its attention to what is presented by the bill and its proper appendages: *Forsyth v. Matthews*, 14 Pa. St. 100; S. C., 53 Am. Dec. 522.

To enable the appellate court to decide upon the propriety of instructions given, or the pertinency of those refused, the evidence must be preserved in the bill of exceptions, and enough of it given to show whether error has been committed: *Houston v. Lane*, 39 Mo. 495; *Hoof v. Rollins*, 7 W. Va. 540; *Potter v. Wooster*, 10 Iowa, 334; *Paine v. Smith*, 32 Wis. 335; *Brewer v. Strong's Ex'rs*, 10 Ala. 961; S. C., 44 Am. Dec. 514; *Lord v. Inhabitants of Kennebunkport*, 61 Me. 462; *Leverett's Heirs v. Carlisle*, 19 Ala. 80; *Forsyth v. Matthews*, 14 Pa. St. 100; S. C., 53 Am. Dec. 522. Compare *Duggins v. Watson*, 15 Ark. 118; S. C., 60 Am. Dec. 560; *Keitt v. Spencer*, 19 Fla. 748. Exceptions will not be sustained, unless the case shows affirmatively that the excepting party has been aggrieved by the ruling complained of: *Bryant v. Knox*, 61 Me. 300; *Day v. Raguet*, 14 Minn. 273; *Hearn v. Shaw*, 72 Me. 187. And there must be an exception to the action of the lower court respecting its rulings on the instructions. Thus a transcript from a circuit court, which contains the instructions marked according to the statute, a bill of exceptions embracing all the evidence, a motion for a new trial for specified errors in giving and refusing charges, and an order overruling the motion, is insufficient to enable the supreme court to consider errors assigned in the instructions in the light of the evidence, unless there is in the record an express recital of exception to the action of the court on the instructions or on the motion for a new trial: *Bourland v. Board of Supervisors*, 60 Miss. 996. But in the earlier practice of Mississippi, instructions asked in the court below, and refused, and so marked by the clerk, were considered as if excepted to, without a formal bill of exceptions: *Watson v. Dickens*, 20 Id. 608. Where the judge, after signing the bill of exceptions, wrote on it that "the whole charge given to the jury" was to be inserted therein, this not referring on its face to a written charge on file, it was held a fatal defect: *Oliver v. Town*, 24 Wis. 512.

Under the Texas practice, however, no formal bill of exceptions to instructions given or refused is necessary: *Jones v. Thurmond*, 5 Tex. 318; *Earle v. Thomas*, 14 Id. 583. In the case last cited, at page 593, the court used the following language: "It has sometimes been said that a party wishing to take advantage of any error in the charge of the court must except. But by this it is not intended that he shall take a bill of exceptions; for he may attain the same purpose by asking such instructions as will place the law of the case in a proper light before the jury, which, if refused, will have the effect of a bill of exceptions. So, in Arkansas, the instructions need not be embodied in the bill of exceptions; if they are so marked and referred to that

they may be identified, it is sufficient: *Stirman v. Cravens*, 29 Ark 548. Good practice requires that instructions be numbered: *Kansas Pacific R'y Co. v. Ward*, 4 Col. 30; and signed. Thus, under the Indiana statute, if one desires special instructions, they must be reduced to writing, numbered and signed by such party or his attorney, and delivered to the court: *Sutherland v. Hankins*, 56 Ind. 343. If the instructions are not thus signed, and are refused, the party asking them cannot be heard to complain of such refusal in the supreme court: *McCammack v. McCammack*, 86 Id. 387. Where an instruction asked by a party is in writing, and signed by the party or his attorney, it thereby becomes a part of the record. An exception may be taken to the giving of such instruction or the refusing of it by the words "given" (or refused), and "excepted to" being written after it, and signed by the party excepting, or his attorney. If such instruction be so made part of the record, and the exception be so entered, the instruction need not be authenticated by the signature of the judge, or put into a bill of exceptions: *Jeffersonville etc. R. R. Co. v. Cox*, 37 Id. 325. For extended note on subjects of instructions to juries, and to what extent the judge may comment upon the evidence, see *State v. Whit*, 72 Am. Dec. 538-549.

MILWAUKEE GAS LIGHT CO. v. SCHOONER GAMECOCK.

[28 WISCONSIN, 144.]

LEGISLATIVE ACT OR CITY ORDINANCE FORBIDDING VESSELS TO DRAG THEIR ANCHORS IN NAVIGABLE STREAM IS INVALID so far as it interferes with the rights of navigation secured by the ordinance of 1787.

RIGHTS OF NAVIGATION ON NAVIGABLE RIVER WITHIN LIMITS OF CITY ARE PARAMOUNT to the right of a city gas-light company to lay its pipes across the bed of such river.

IT IS RIGHT OF VESSEL ON NAVIGABLE RIVER WITHIN LIMITS OF CITY to be towed up or down the river by a steam-tug, and where that is the usual or convenient method, to be so towed stern foremost and with an anchor dragging at the prow.

GAS COMPANY CANNOT RECOVER IF THEIR GAS-PIPES IN BED OF NAVIGABLE RIVER WITHIN LIMITS OF CITY ARE INJURED BY ANCHOR of vessel being towed up or down the river, and without negligence on the part of those managing the vessel. But they can recover if there was such negligence.

PARTY TO SUIT CANNOT BE SWORN AND EXAMINED AS WITNESS IN HIS OWN BEHALF WITHOUT NOTICE of his intended examination having been given: See Wisconsin Laws of 1863, chapter 17.

PLAINTIFF was incorporated in 1852, and by its charter was empowered to manufacture and sell gas for the purpose of lighting the city of Milwaukee, etc., and to lay pipes for the purpose of conducting the gas in any of the streets, avenues, etc., of said city. In 1865 it laid down a large gas-pipe across the Menominee River, just below a certain drawbridge, and within the lines of a street. It was claimed to have been laid five feet below the bed of the river. Before this, in 1864, the

common council of Milwaukee had adopted an ordinance, which had not been repealed at the time this suit was brought, forbidding any vessel to be towed in the Milwaukee or Menominee rivers, within the limits of the city, by any tug or vessel propelled wholly or in part by steam, with the anchor of such, so towed, drawn or dragging on the bottom of the river. In April, 1866, the defendant schooner was being towed down the Menominee River by a steam-tug, stern foremost, and with an anchor dragging at the prow. The anchor caught said gas-pipe, and tore it up from the bed of the river. Plaintiff alleged the injury to have been done "willfully and maliciously." This the answer denied, and alleged that the dragging of the anchor was "a necessary and prudent act of navigation," and the fouling of the anchor an inevitable accident. One Wills was examined as a witness for the defense, though objected to, as shown in the opinion. The jury were instructed that, "if it was a proper act of navigation for vessels passing up and down a navigable stream to drag their anchors on the bottom, if it was an act incident to the sailing of vessels and towing them out of harbors or narrow streams, an ordinance of the city could not prohibit it"; that plaintiff had a right under its charter to locate its pipe so as to connect the banks of the river, for the purpose of transmitting gas, so as to supply the whole city, though the river was not specially mentioned in its charter, but that this right was subordinate to the rights of navigation; that from the uncontradicted testimony on that subject they had to assume that the dragging of the anchor at the prow was a proper act of navigation under some circumstances; that the jury had to determine whether those circumstances existed in this case; that if, by proper care and diligence, the injury to the pipe might have been prevented "after" the anchor came in contact with it, plaintiff was entitled to a verdict; and that in determining that question they were to consider whether any and what degree of publicity had been given to the fact that the pipe was there, and to consider the evidence tending to show that the captain, in the first instance, did not know of the existence of the pipe in that place. The court refused plaintiff's sixth instruction, which was as follows: "If the captain of the defendant vessel, upon fouling with the pipe, was informed that he had caught the gas-pipe, and if, with proper precaution, he could have prevented the injury, then defendant is liable for all injury which he could so have prevented." Verdict for de-

ferendant. New trial denied. Judgment upon the verdict. Plaintiff appealed.

James S. Brown, for the appellant.

Emmons and Van Dyke, for the respondent.

By Court, DIXON, C. J. The great question in this case is that which relates to the duty of the company to lay its pipes so as not to interfere with the rights of navigation. We have examined this question with much care, and are satisfied that the charge of the learned judge is a correct statement of the law applicable to the case. A subject which has been so frequently and ably discussed elsewhere, and which was so clearly expounded by the court below, requires no further discussion at the hands of this court. The question is settled by authority, and we fully sanction and affirm all that the court below said to the jury upon it.

If it had been error for the court to refuse the sixth instruction asked by the plaintiff, such error was cured by the explicit language of the general charge upon the same point. The jury were directed to take all the circumstances into consideration, and if they came to the conclusion that, after the anchor came in contact with the pipes, the injury might have been prevented by proper care and diligence on the part of the vessel owners, then the plaintiff would be entitled to a verdict. After having already thus instructed the jury, we do not think it was the duty of the court to repeat the instruction, or to give another to the same effect at the request of plaintiff.

And in the entire proceedings we see no error, except in the admission of the part owner of the vessel, Mr. Wills, as a witness. He was admitted contrary to the provisions of chapter 17, Laws of 1863, which requires notice of his intended examination to be given: *Ernst v. Steamboat Brooklyn*, 22 Wis. 649; *Sika v. Chicago and Northwestern R'y Co.*, 21 Id. 370. But as Mr. Wills testified to no facts material to the case, or which the jury must not have found in the same way without his testimony, we hold that the error in admitting him was immaterial, and the judgment must be affirmed.

Judgment affirmed.

DETROIT AND MILWAUKEE R. R. Co. v. CURTIS.

[28 WISCONSIN, 152.]

QUESTION OF NEGLIGENCE IS OF FACT FOR JURY, AND WILL BE SUBMITTED TO THEM, except in those cases where the proof is so clear and decisive in its character as to warrant the court in saying, as a matter of law, that there is nothing to submit.

FACTS SHOWING WHEN QUESTION OF NEGLIGENCE SHOULD BE SUBMITTED TO JURY. If the evidence tends to show that a railroad train had come to a full stop, that the persons waiting to get upon it were told to go on board by the persons in charge, and that the plaintiff, in attempting to get aboard, was injured in consequence of the sudden starting of the train, it is not error to submit the question of the negligence of the parties to the jury.

IT IS NEGLIGENCE IN SERVANTS OF RAILROAD COMPANY TO TELL PASSENGERS TO GO ABOARD WHEN TRAIN IS NOT READY FOR THEIR RECEPTION. After being told to go on board in any car, a passenger has a right to draw the conclusion that the train is ready for his reception, and he cannot be considered negligent in attempting to do so.

CONTRIBUTORY NEGLIGENCE INSUFFICIENT TO WITHDRAW PLAINTIFF'S CASE FROM JURY. — Where a plaintiff, in attempting to get aboard a railroad train, was injured in consequence of its sudden starting, the fact that he was told by the company's servants to get on the hind car, and that he was injured in trying to get on another passenger-car, is not such conclusive proof of negligence on his part as to take the case from the jury.

TO ATTEMPT TO GET ON OR OFF WHILE RAILROAD CARS ARE IN MOTION IS ACT OF NEGLIGENCE.

RAILROAD COMPANIES ARE NOT REQUIRED TO HAVE SPECIAL AGENTS, WEARING BADGES, TO PREVENT PASSENGERS FROM INJURING THEMSELVES by negligent acts in getting on or off railroad trains. They have a right to assume that travelers can take care of themselves in traveling upon railroads constructed with proper care and skill.

ACTION by Curtis and wife against the railroad company, for injuries to the person of Mrs. Curtis from her being thrown from the platform of a car on one of the company's trains, in consequence of the sudden starting of the train while she was getting upon it. The evidence was conflicting, — the plaintiffs' tending to show that the train had come to a full stop, and that passengers were told to get aboard; the defendants' tending to show that there was a stoppage for a few moments only, if at all, preparatory to running forward a few feet to "take up the slack of the train," and to get in the right position for passengers; and that no one was directed to get aboard until after the accident happened, but on the contrary, passengers were warned to keep away from the cars. The result of the evidence, as viewed by the court, is stated in the opinion. A motion by the company, after the evidence was all in, that

the case be taken from the jury, was denied. Verdict for the plaintiffs. A motion for a new trial was denied. Judgment was rendered upon the verdict, which the company sought to reverse on error. Other facts are stated in the opinion.

Emmons and Van Dyke, for the plaintiffs in error.

Butler and Winkler, for the defendants in error.

By Court, PAINE, J. I cannot assent to the position of the counsel for the plaintiffs in error that there was such an absence of evidence of any negligence on the part of the company, and such clear proof of negligence on the part of the plaintiffs below contributing to the injury, that the court should have taken the case from the jury. If it had appeared that the train was brought to a stand in the usual manner, and that the plaintiff who was injured had, of her own motion and without any instigation from the agents and servants of the company, attempted to go on board before the cars had fairly stopped, and during the jerking motions that usually result, as the proof shows, in stopping a long train, and had been injured by reason of such attempt, there would be much more ground for sustaining this position. But here there is evidence tending to show that the train came to a full stop, and that the passengers were told to go on board by the persons in charge of the train. There is certainly proof tending to show that the train had come to a full stop after the jerking motions resulting from checking its speed had ceased. Not only the direct statements of the witnesses, but the fact that all the passengers at the station were getting on board at the same time the plaintiffs did, tends to show this; for though there is occasionally an individual who will take the risk of getting on board before the cars stop, yet passengers generally do not. But even if it had not come to a full stop, and the stop during which the plaintiffs attempted to go on board was one of those which resulted merely from checking the speed of the train, as the counsel urges, yet when the passengers were told by those managing the train to go on board, they had a right to assume that the train was ready for their reception, and cannot be charged with negligence in following that direction, the train, when they attempted to enter, being actually still at the time. If the train was not ready for their reception, it was a clear act of negligence in the servants of the company to tell them to go on board, as the proof shows was done in this case.

And it makes no difference that they were told to go to the hind car, and that the plaintiffs, instead of doing so, attempted to enter the third car from the rear. The conclusion which they had a right to draw from being told to go on board in any car was, that the train was ready to receive them. And the direction to go to the hind car could only have been reasonably understood as informing them where they could most conveniently find seats. There was no occasion for them to infer that they were guilty of any negligence or exposing themselves to any danger if they entered another car. And if the plaintiff was guilty of no other negligence than that, and was injured by starting the cars suddenly and without notice while so entering, she ought to recover. The question of negligence is one of fact for the jury, and will be submitted to them, except in those cases where the proof is so clear and decisive in its character as to warrant the court in saying, as a matter of law, that there is nothing to submit. And that certainly was not the case here.

But there is one proposition in the instructions given by the court which I think cannot be sustained. It is found in the remarks immediately succeeding the fourth instruction asked by the plaintiffs, partly as an addition to that instruction, and partly in further enlarging upon the same idea. Without quoting them literally, it is enough to say that they told the jury that if they believed from the evidence that if the company had had an agent, wearing its badge, whose special duty it was to warn passengers not to go on board till the cars stopped, and to inform them in what cars to enter, and to tell them that there was room for all, etc., and that such an agent would have prevented the injury, and that there was no such agent there, then the defendant was guilty of negligence, and liable in the action. I know of no law requiring this of railroad companies. And while they are justly held to a strict responsibility, and required to exercise the highest degree of care and diligence to provide for the safety of their passengers, yet I think no such application of this rule as that contained in this proposition of the court below has ever been made, and that it would be unreasonable to make it. The extreme vigilance and care required of them relate usually to the proper construction and management of their cars and road.

But the instruction of the court below would hold the company liable, although there was no negligence whatever in the management of its train, because it did not have a special

agent to warn the plaintiff not to go on board till the cars had stopped, and to give her general information about getting on board. This it was not bound to do. On the contrary, it had a right to assume that the plaintiff, and all other persons traveling, possessed that ordinary intelligence and prudence necessary to enable them to take care of themselves, in view of the ordinary incidents of traveling upon railroads that are constructed with proper care and skill. Getting on and off the cars are among these incidents. To attempt to get on or off while the cars are in motion is an act of negligence. And to say that a railroad company is liable for not having a special agent to prevent passengers from injuring themselves by such acts, is to say that, without any other negligence on its part, it is to be held liable for not having an agent to prevent passengers from injuring themselves by their own want of ordinary care and prudence. There is no reason or authority for such a proposition. Nor can I see any support for it in the section of the statute of Michigan which was proved at the trial, and which, it is suggested, "contemplates" the appointment of such an agent. I cannot see that it in any way contemplates or implies the existence of an agent for such a purpose. It seems to be nothing more than a provision requiring such agents as the company does have to wear a badge indicating their respective offices.

As the evidence was conflicting, and it is impossible to say what effect the jury may have given to this instruction, the judgment must be reversed, and the cause sent back for a new trial.

Ordered accordingly.

QUESTION OF NEGLIGENCE IS FOR JURY WHERE EVIDENCE IS CONFLICTING: *Louisville etc. R. R. Co. v. Collins*, 87 Am. Dec. 486; note to *Huelsenkamp v. Citizens' R'y Co.*, 90 Id. 407; note to *Ernst v. Hudson River R. R.*, 90 Id. 786; *Simmons v. Steamboat Co.*, 93 Id. 99, note 106; note to *Snow v. Housatonic R. R. Co.*, 85 Id. 730. As to when negligence is a question of law, see note to *Wilson v. City of Charlestown*, 85 Id. 694.

CONTRIBUTORY NEGLIGENCE INSUFFICIENT TO WITHDRAW PLAINTIFF'S CASE FROM JURY: *Warren v. Fitchburg R. R. Co.*, 85 Am. Dec. 700; *Snow v. Housatonic R. R. Co.*, 85 Id. 720, note 730. Contributory negligence sufficient to withdraw case from jury: See notes to *Butterfield v. Western R. R. Corp.*, 87 Am. Dec. 682; *Fox v. Sackett*, 87 Id. 684.

COMMON CARRIERS MUST GIVE PASSENGERS TIME TO ALIGHT, ANNOUNCE STATIONS, ETC.: See cases cited in notes to *Southern R. R. Co. v. Kendrick*, 90 Am. Dec. 343, showing that passengers are bound to use ordinary care, and must take notice of established customs and rules.

NORTHWESTERN IRON CO. v. ÆTNA INSURANCE CO.

[28 WISCONSIN, 160.]

PAROL CONTRACT OF INSURANCE WAS VALID AT COMMON LAW.

PAROL CONTRACT OF MARINE INSURANCE IS VALID, and an action can be maintained thereon.

ACTION upon a parol contract of marine insurance. The complaint alleged that in June, 1865, plaintiff applied to the agents of the insurance company in Milwaukee for marine insurance upon a certain quantity of pig-iron, which the plaintiff proposed to ship over the lakes from Milwaukee to Cleveland, Ohio, "against all adventures and perils of the said lakes," etc., to an amount specified; "and that thereupon said defendant, by its said agents thereto duly authorized, proposed and agreed with the plaintiff to insure the said pig-iron in the manner and against the perils aforesaid, and to the amount aforesaid," at a specified rate, "which proposition or offer was accepted by the plaintiff; and said plaintiff was also to notify said agents of said defendant, from time to time as said iron was shipped, of the amount of each shipment, and of the vessel whereon the same was shipped, and that thereupon the risk and insurance aforesaid was to commence," etc. For allegations as to what was done "pursuant to said arrangement," see the opinion. These were followed by the usual averments as to losses, etc. The complaint was demurred to on the ground that it did not state a cause of action. The demurrer was sustained, and the plaintiff appealed. Other facts are stated in the opinion.

Butler and Winkler, for the appellant.

Emmons and Van Dyke, for the respondent.

By Court, *COLE, J.* It appears to us that the complaint states a cause of action. It is alleged, among other things, that the defendant corporation was chartered and doing business under the laws of the state of Connecticut, "and was duly authorized to do the several acts hereinafter mentioned, and that the business of said defendant during the same times was and is that of insuring property against loss and damage by fire, and by perils of the seas, and the inland waters of the United States," etc.; and that it "did such business by its agents at the city of Milwaukee," etc.; that Whaling and Belden "were the general agents of said defendant in the city of Milwaukee, fully authorized to act in its behalf, and to

enter into contracts of insurance for and on behalf of said defendant, such as the contract or contracts hereinafter mentioned," etc. The complaint then proceeds to state a parol contract for marine insurance on a quantity of pig-iron, which the plaintiff proposed thereafter to ship, and did ship, from Milwaukee to Cleveland, "against all adventures and perils of the said lakes, and navigable waters connecting the same, and all fires, jettisons, or losses happening therein." It is further averred that, "pursuant to the arrangement," the plaintiff made divers shipments of pig-iron by the lakes, paying the premium from time to time on each shipment, and notifying the agents of the defendant, as agreed upon; "and that at the time notice as aforesaid was given to defendant's agents of the first of said shipments, the plaintiff asked of the agents whether it was to have a policy of insurance on the pig-iron, but was told by the agents that it was not customary to give policies upon such insurance"; but that a memorandum of the insurance was entered by them in a book, and that this entry was sufficient; and did not issue to the plaintiff any written policy of insurance. A shipment, loss, and notice are then alleged.

In the opinion which the county court gave in sustaining the demurrer to the complaint, it is assumed that this court, in effect, held, on the former appeal, that the action could not be maintained. This is a misapprehension of that decision. On the contrary, the clear and almost necessary implication from that decision is, that the action might be sustained, providing it appeared that the agents of the company had authority to make the parol contract of insurance relied on. In the absence of all evidence upon the point, it was said the presumption must be that the agents only had power to make contracts of insurance in the usual way by written policies, and perhaps to make parol agreements to issue them, but would have no authority to insure by parol. Now, the authority of the agents to make the contract set out in the complaint is specifically alleged, and of course admitted by the demurrer. And this narrows the case down to the single question so fully discussed upon the argument of this and the former appeal, whether an action can be maintained to recover the amount insured directly upon a parol contract to insure. And notwithstanding the able and learned argument of the counsel, by whom the negative of this proposition is affirmed, I am unable to see any satisfactory reason why such an action cannot be

maintained. It is the language of the authorities that a parol contract of insurance was valid at common law; and what principle of public policy or of statute law does such a contract violate or contravene? It is admitted that a parol agreement to insure is good to compel the company to execute and deliver a policy; and that in some cases, where bills had been filed for that purpose, courts, in order to avoid circuity of action, had given a decree for the payment of the money which would have been payable if the policy had been issued. Counsel have cited many such cases on their briefs. But it is said in no case has a recovery been had, *ex directo*, upon a parol policy. Such suits are undoubtedly very rare, because the practice almost always is to issue written policies.

The case of *New England Fire and Marine Ins. Co. v. Robinson*, 25 Ind. 536, is treated by the court as an action upon a parol contract of insurance, although possibly it might be maintained as an action against the company for a refusal to deliver a policy, according to the intimation of Mr. Justice Bronson in *Lightbody v. North American Ins. Co.*, 23 Wend. 18-24. But still the authorities say that, upon the principles of the common law, a contract of insurance need not necessarily be a formal written document denominated a policy. "The contracts might be in writing, or by parol. They may be in the form of an undertaking which imports a present risk completely assumed, or they may be executory, for the delivery of a policy or a renewal of a policy at a future day": Comstock, J., in *Trustees of First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 306-310. And now, although the usage of written contracts of insurance has long and generally prevailed, yet can the courts say that an action upon a parol contract cannot be maintained? It seems to us not. If the agents of the company were fully authorized to make the contract set out in the complaint, we know of no satisfactory reason why a recovery may not be had upon it. And this is the clear implication of the former opinion in this case: 21 Wis. 458.

The order of the county court is reversed, and the cause remanded for further proceedings according to law.

ORAL CONTRACT OF INSURANCE IS BINDING. There is no rule of law requiring it to be in writing: See *Sanborn v. Fireman's Ins. Co.*, 77 Am. Dec. 419, note 422.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: A verbal contract of insurance is valid, and an action can

be maintained upon it: *Strohn v. Hartford Fire Ins. Co.*, 33 Wis. 654; *Northwestern Iron Co. v. Etna Ins. Co.*, 26 Id. 78, 82. And a parol contract of marine insurance being valid, even if it is, by custom, subject to the conditions of the written policies, a parol agreement is also valid, by which the insured is to have a privilege which would require a special indorsement on the written policy, were that relied on: See case last cited.

PIKE v. MILES.

[28 WISCONSIN, 164.]

HUSBAND'S CONVEYANCE OF EXEMPT HOMESTEAD TO HIS WIFE IS NOT FRAUDULENT AS TO HIS CREDITORS.

SUBSEQUENT CREDITORS CANNOT IMPEACH HUSBAND'S VOLUNTARY SETTLEMENT ON WIFE of land other than such as was exempt, if such settlement was not unreasonable in its character in view of the property and situation of the husband at the time, and there was in fact no fraudulent intent.

CONVEYANCE AS TO EXCESS NOT FRAUDULENT AS AGAINST SUBSEQUENT CREDITORS WHEN. — Where the whole value of a homestead conveyed by a husband to his wife was forty thousand dollars, and the homestead contained land, in excess of the amount exempt by law, worth five thousand dollars, and the husband was worth seventy-five thousand dollars, over and above his debts, at the time of the conveyance, it was held that the conveyance, as to such excess, was not fraudulent as against subsequent creditors.

REAL INQUIRY IN CONVEYANCE ALLEGED TO BE FRAUDULENT AS AGAINST SUBSEQUENT CREDITORS is not whether the grantor was indebted, but whether he had ample and abundant means to satisfy all his debts after the conveyance.

WISCONSIN STATUTE DEFINING RIGHTS OF MARRIED WOMEN OVER THEIR SEPARATE ESTATE DOES NOT APPLY to real estate derived from the husband. It applies only to her real estate derived from other sources.

EVIDENCE INADMISSIBLE WITHOUT SUPPLEMENTAL COMPLAINT TO SUPPORT IT. — In an action to set aside a conveyance of land from husband to wife as fraudulent, evidence on the plaintiff's part that a mortgage had been executed by the husband and wife on said land after the commencement of the suit, and that the money raised by such mortgage was invested in other real estate in the wife's name, was held to be inadmissible without a supplemental complaint, setting up the facts and asking appropriate relief against such other real estate.

ACTION by the judgment creditors of F. B. Miles against him, his wife, Ella V. Miles, and one Miller, to have certain conveyances of real property from said F. B. Miles to Miller, made July 10, 1865, and immediately from the latter, and as a part of the same transaction, to said Ella V. Miles, set aside as fraudulent, and for the appointment of a receiver, etc. The defendants answered severally. The conveyances were held valid, and the complaint dismissed as to the defendants

Ella V. Miles and Miller. Plaintiffs appealed. The evidence showed that Mr. Miles was engaged in a "general produce, whisky, and commission business," from July, 1865, to January 5, 1866, when he failed; that his business amounted to "from a quarter to a half million of dollars per month"; that on July 1, 1865, he "was worth seventy or eighty thousand dollars above all liabilities, after deducting homestead and furniture"; that on the first of each of the months above named he entered upon his books a statement of his liabilities and assets, and that these statements footed up as follows:—

	Liabilities.	Assets.
July, 1865	\$82,677	\$213,638
August, 1865.....	72,207	169,292
September, 1865.....	185,341	196,015
October, 1865.....	182,881	240,317
November, 1865.....	306,042	344,730
December, 1865	407,623	413,087
January, 1866.....	274,213	268,672

The indebtedness for which the plaintiffs obtained their judgment was contracted in September or October, 1865, and was for whisky. Other facts are stated in the opinion.

Butler and Winkler, for the appellants.

Finches, Lynde, and Miller, for the appellees.

By Court, PAINE, J. The court below found, and the proof sustains the finding, that at the time Frederick B. Miles conveyed his homestead to his wife, he was worth seventy-five thousand dollars, over and above his debts, exclusive of the homestead itself. The homestead was worth about forty thousand dollars, containing something over the quarter of an acre which by law was exempt from execution, the excess being of the value of from four thousand to five thousand dollars.

This court has decided, in *Dreutzer v. Bell*, 11 Wis. 118, that a conveyance of the homestead by the husband to the wife cannot be held fraudulent as to creditors, for the reason that, being exempt, it was no more beyond their reach after the conveyance than before. It was not liable for their debts at all. And that decision is applicable here, as to so much of the property conveyed as was exempt from execution: See also *Legro v. Lord*, 10 Me. 161. It is unnecessary to determine whether the conveyance might have been avoided as to the excess beyond the quarter of an acre, by creditors existing at

the time. For the debts of the plaintiffs in this case were contracted subsequent to the conveyance, and the question is, whether there are any grounds for avoiding the conveyance either in whole or in part as to them. As to the portion exempt, of course they stand in no better position than existing creditors would have had. As to the portion not exempt, the conveyance must be regarded as a voluntary settlement upon the wife by the husband. And in regard to that, if it was not unreasonable in its character in view of the property and situation of the husband, and there was no fraudulent intent in fact, I think the law is, that it cannot be impeached by a subsequent creditor. There are authorities that sustain the same rule as to existing creditors. But subsequent creditors are in a less favorable position, because their debts, being contracted after the conveyance they seek to impeach, cannot be said to have been incurred on the faith of the property conveyed. In addition to the authorities cited by the respondents' counsel upon this point, the following may also be referred to: *Benton v. Jones*, 8 Conn. 185; *Converse v. Hartley*, 31 Id. 372; *Pomeroy v. Bailey*, 43 N. H. 118; *Sexton v. Wheaton*, 8 Wheat. 242; *Hinde v. Longworth*, 11 Id. 211; *Townsend v. Maynard*, 45 Pa. St. 198; *Beal v. Warren*, 2 Gray, 447; *Moore v. Blondheim*, 19 Md. 172; *Thacher v. Phinney*, 7 Allen, 146; *Lyman v. Cessford*, 15 Iowa, 229.

The including of the excess over what was exempt in the conveyance to the wife cannot be regarded as unreasonable in view of the condition of Frederick B. Miles at that time. And it seems very clear, as the court below found, that there could have been no actual fraudulent intent, either as to existing or subsequent creditors. This being so, applying the rule of law established by the authorities above cited, it follows that the conveyance cannot be impeached by these plaintiffs.

The case of *Mullen v. Wilson*, 44 Pa. St. 413 [84 Am. Dec. 461], relied on by the appellants' counsel, is not inconsistent with the doctrine of the cases above cited, for it was based upon the idea of an actual fraudulent intent as against the subsequent creditors.

I do not think the language of some of the cases relied on by the appellants — to the effect that a voluntary conveyance by one largely indebted at the time is void as to creditors — should be taken in an absolute sense. In order to give it that effect, they mean that he must be largely indebted in comparison to the amount of his assets. A man with property

worth only one thousand dollars, and owing nine hundred dollars, might be said to be largely indebted, within the meaning of those cases. But if he had one hundred thousand dollars of property, and owed twenty-five thousand dollars, I think he would not. The true question is better stated in the other cases, found among those above cited. which hold that the inquiry is not whether the grantor was indebted, but whether he had ample and abundant means to satisfy all his debts after the conveyance. That he had in this case, abundantly appears, taking his statements as true, and there was no evidence to contradict them. Nor is there anything to show that this estimate of his assets depended on the success of adventures which he then had at risk, as was the case in *Carpenter v. Roe*, 10 N. Y. 227. On the contrary, he swears that he then owned, in property exclusive of his homestead, seventy-five thousand dollars more than enough to pay his debts. The exhibit showing the amount of his debts and assets in July, 1865, — the month in which this conveyance was made, — shows debts something over eighty-two thousand dollars, and assets something over two hundred and thirteen thousand dollars. This, taken in connection with the fact that the great bulk of the property conveyed to his wife was a homestead, absolutely exempt from execution, seems wholly to exclude all idea of any fraudulent intent as to creditors, with respect to the comparatively small amount of the excess over the exemption, and all idea of placing that amount beyond the contingencies of his business. I can see, therefore, no ground for disturbing the conveyance in favor of these plaintiffs.

It appeared by a stipulation in the case, subject to objection for irrelevancy and incompetency, that since the commencement of this suit the wife and husband have mortgaged the property for twelve thousand dollars lent to the wife, and which she has invested in a milling business, in which she employs her husband at a salary; and also that they had mortgaged it to secure some debts of the husband. The appellants' counsel then contends that even though this property is to be regarded as the wife's, yet it is not to be regarded as her separate estate, as to which she has the powers and rights given by our statute in regard to the separate estate of married women, because she derived this from her husband, while the statute applies only to real estate derived by married women from other sources. In this, I think he is correct. But he then contends that it follows that this money raised by the mort-

gage was the husband's money, and that his creditors are entitled to it. This question we shall not determine, for the reason that this mortgage was made after this suit was begun, and the money raised by it has been invested in the wife's name in other real estate. If the plaintiffs have any remedy in respect to that, they should have averred the facts by a supplemental complaint, and asked the appropriate relief. The evidence, being objected to as incompetent under the pleadings, should have been excluded.

I think the judgment should be affirmed.

Judgment affirmed.

VOLUNTARY CONVEYANCE OF LAND FROM HUSBAND TO WIFE WILL BE UPHOLD WHEN, AND WHEN NOT: See extended note to *Wilder v. Brooks*, 8th Am. Dec. 54-56; *Peck v. Brummagin*, 89 Id. 195. Respecting the effect of such conveyance as to creditors, both existing and subsequent, see cases cited in note to *Belford v. Crane*, 84 Id. 163. The relation of the debtor's property to his debts must be considered, if it is sought to make the conveyance void: *Filley v. Register*, 77 Id. 522.

SEPARATE PROPERTY OF WOMEN AS AFFECTED BY AMERICAN STATUTES: See note to *Kirkpatrick v. Buford*, 76 Am. Dec. 367-401.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: Equity will sustain a conveyance to the wife direct from the husband, where the rights of creditors do not intervene: *Dayton v. Walsh*, 47 Wis. 118; *Price v. Osborn*, 34 Id. 41. The owner of property exempt from forced sale may sell it or give it away, either to his wife or a stranger, without committing a fraud upon his creditors; and when the title has in fact passed to the vendee or donee, the property is not subject to execution for the former owner's debts, whatever may have been his motive in the sale or gift: *Carhart v. Harshaw*, 45 Id. 347; *Allen v. Perry*, 56 Id. 185; unless gift or sale was made with intent to perpetrate a fraud upon the exemption law; and even in that event such intent would not avoid the gift or sale, unless the debtor had in fact made an attempt to defraud the exemption law by purchasing other property of like kind, which he claimed to hold as exempt, or by abandoning the use of the exempt property sold when such use rendered it exempt: See case last cited. A debtor's conveyance of a homestead exempt by law is not considered fraudulent as to creditors: *Hübner v. Soyer*, 33 Id. 322; but he may abandon the property as his homestead, and thus voluntarily subject it to forced sale on execution, or otherwise, so far as he is concerned; and by an attempted conveyance of it to defraud the collection of his wife's judgment for alimony, he may lose all claim to it as a homestead, and cannot, therefore, deny fraud in the conveyance on the ground that, as a homestead, the land was not subject to sale on execution: *Barber v. Dayton*, 28 Id. 382. The owner of a legal subdivision of land precisely equal to the statutory measure of a homestead right, whose dwelling-house is situate upon such subdivision, and who has made no different selection, will be held to have selected that subdivision for his homestead, although he also owns adjoining lands from which he might have selected his homestead in part: *Kent v. Lasley*, 48 Id. 263.

SMITH v. SMITH.

[23 WISCONSIN, 176.]

IN CONVEYANCE OF LAND TO HUSBAND AND WIFE, THEY ARE BOTH SEIZED, DURING THEIR JOINT LIVES, OF ENTIRETY. Neither of them can alien so as to bind the other, and the survivor takes the whole estate.

CONDITIONAL LIMITATIONS IN DEEDS ARE VALID.

CONDITIONS AND LIMITATIONS IN DEEDS DISCUSSED, AND DISTINGUISHED FROM EACH OTHER.

CONDITIONAL LIMITATION IS OF MIXED NATURE, and partakes of a condition and a limitation.

CONDITIONAL LIMITATION OF WIFE'S ESTATE IN DEED TO HUSBAND AND WIFE. — A deed granted land to a husband and wife, their heirs and assigns, forever, with a clause stating that it was made to the wife on condition that if she should not continue to live with her husband, having no good cause for a divorce, the land should vest in fee in the husband, his heirs and assigns, forever. The *habendum* clause was to the grantees, their heirs and assigns, forever. There was also a covenant of warranty. *Held*, that there was a valid conditional limitation of the wife's estate.

TO REMOVE CLOUD ON TITLE, EQUITY WILL DECREE CANCELLATION OF DEED OR OTHER INSTRUMENT WHICH HAS BECOME FUNCTUS OFFICIO. — Thus where a deed grants land to a husband and wife, with a clause stating that it is made to her on condition that if she shall not continue to live with him, having no good cause for a divorce, the land shall vest in fee in the husband, the wife's estate ceases and vests in the husband, after she deserts him, having no ground of divorce; and the deed, so far as it relates to the wife, constitutes such a cloud upon his title that equity will cancel it at his suit, and this notwithstanding he has obtained a decree of divorce from her for willful desertion.

ACTION by Uriel B. Smith against Miranda A. Smith, to have plaintiff adjudged to be the owner in fee-simple of certain real estate, free from all claim of title on the part of the defendant. Both parties claimed under a deed which granted the land to them, etc., as in the opinion and first section of syllabus, *supra*. Full covenants of seisin and warranty were added. The complaint was demurred to as not stating a cause of action. The demurrer was sustained, and the plaintiff appealed.

Rogers and Johnson, and J. Downer, for the appellant.

Carpenter and Cogswell, for the respondent.

By Court, COLE, J. 1. What effect must be given to the deed referred to in the complaint? It is a deed from Cox and wife, as parties of the first part, to the defendant, party of the second part, together with the plaintiff, upon the conditions thereafter mentioned. After the description of the land conveyed, occurs the following clause, which creates the difficulty in determining the nature and quality of the estate

granted: "This indenture is made to the aforesaid Miranda A. Smith on condition that she shall continue to live with the aforesaid Uriel B. Smith, her husband (unless she shall hereafter have good cause for divorce), and further, on condition, if the said Uriel B. Smith shall survive the said Miranda A. Smith, or she shall not continue to live with her said husband, Uriel B. Smith, as aforesaid, then, and in either case, the aforesaid described land shall vest in fee in said Uriel B. Smith, his heirs and assigns, forever."

It is claimed by the plaintiff that this condition in the deed is valid, being what in the books is termed a conditional limitation; that the grant being to a husband and wife, each separately takes a fee in the land subject to be defeated by the other surviving him or her; and further, in case of the wife, the estate to terminate whenever she should cease to live with her husband, not having good cause for divorce; and that as it appears from the allegations of the complaint that the wife has ceased to live with the plaintiff, not having any cause for a divorce from him, the contingency has happened upon which, by the limitations in the deed, the entire estate vests absolutely in the plaintiff. It appears to us that this is a correct view of the effect of the deed. It is admitted that in a conveyance of land to husband and wife they are both seised during their joint lives of the entirety; that neither of them can alien so as to bind the other; and that the survivor takes the whole estate. But in this deed there was another event, besides death, which was to determine the estate of the wife; and that was, if the wife should cease to live with her husband, not having a good cause for a divorce. The interest granted to her was confined to that period, and this was its limitation, both being alive.

There is much subtle learning in the books in regard to the distinction between conditions and limitations in deeds; so much so that it is sometimes difficult to determine whether the words used are words of condition, making the estate voidable, or words of limitation, making the estate to cease. In Professor Greenleaf's edition of Cruise on Real Property, title 18, chapter 2, section 64, the author says: "Lord Coke mentions a distinction between a condition that defeats an estate, but requires a re-entry, and a limitation which determines the estate *ipso facto*, without entry. Of the first sort, it has been shown that a stranger cannot take advantage; but of limitations it is otherwise; as, if a man makes a lease *quousque*, that

is, until J. S. returns from Rome; the lessor grants over the reversion to a stranger; J. S. returns from Rome; the grantee of the reversion may take advantage of the return of J. S., and enter, because the estate was determined by an express limitation." In the editor's note 1 to this section, the different estates are distinguished in the following clear manner:—

"A condition is something inserted for the benefit of the grantor, giving him the power, on default of performance, to destroy the estate if he will, and revest the estate in himself or his heirs. As the law does not presume forfeiture, it requires some express act of the grantor, as evidence of his intent to reclaim the estate, viz., an entry.

"A limitation is conclusive of the time of continuance and of the extent of the estate granted, and beyond which it is declared at its creation not to be intended to continue. Conditions render the estate voidable by entry. Limitations render it void without entry. If upon failure of that upon which the estate is made to depend, no matter how expressed in the deed, the land is to go to a third person, this is a limitation over, and not a condition. For if a condition, an entry by the grantor would be necessary; and he might defeat the limitation by neglecting to enter. A limitation is imperative, and is determined by the rules of law. A condition not only depends on the option of the grantor, but is also controlled by equity if the grantor attempts to make an inequitable use of it. The performance of a condition is excused by the act of God, or of the law, or of the party for whose benefit it was made. A limitation determines the estate absolutely, whatever be its nature."

See also 11 American Jurist, page 42, for an instructive article on this branch of the law.

Chancellor Kent says: "A conditional limitation is of a mixed nature, and partakes of a condition and a limitation; as, if an estate be limited to A for life, provided that when C returns from Rome it shall thenceforth remain to the use of B in fee, it partakes of the nature of a condition, inasmuch as it defeats the estate previously limited; and is so far a limitation, and to be distinguished from a condition, that upon the contingency taking place, the estate passes to the stranger without entry, contrary to the maxim of law, that a stranger cannot take advantage of a condition broken": 4 Kent's Com. 128.

Now, in the light of these principles, it seems to us clear

that the clause in this deed must be regarded as a conditional limitation. The estate was granted to the wife on condition that she should continue to live with her husband, and was to expire and vest in her husband whenever she should cease to live with him, unless she had good cause for a divorce. The vesting of the entire estate in the husband does not depend upon the election of the grantor to enter; but by force of the condition itself, the land goes to him on the happening of the contingency: *Batty v. Hopkins*, 6 R. I. 443.

It is said that these conditional limitations were not valid at common law in the old conveyances. "There appears, however," says Mr. Butler, in his note to *Fearne on Remainders*, 382, "some reason to suppose that, though conditional limitations were legally void, they were allowed in the modification of uses while uses remained in their fiduciary state at the common law." And he adds that "after the passing of the statute of 27 Hen. VIII., which converted uses from their fiduciary state at the common law into legal estates, it became incumbent on the courts to determine what effect that statute should have in respect to the executory limitations under consideration. When the case was first pressed on the courts, it should seem to have been necessary for them to consider whether the statute executed any modification of property made through the medium of uses which the courts of law would have held illegal, if they had been made of lands themselves in conveyances at common law. So far as respects the modifications of property in question, the courts held them to be executed by the statute, and thus made them a part of the English law of real property." These conditional limitations in deeds, therefore, are valid, and it is perfectly clear from the language here employed that the intention was, that the estate of the wife should determine and vest in her husband when she should cease to live with him, unless she had good cause of divorce.

It is said that this condition annexed to the grant was merely nominal, evincing no intention of actual and substantial benefit to the party to whom or in whose favor it was to be performed, and should be wholly disregarded, and a failure to perform the same cannot operate as a forfeiture of the lands conveyed subject thereto: R. S. 1849, c. 56, sec. 46. The parties, however, saw fit to insert this condition in the deed, and it is presumably for the advantage of the husband that his

wife should continue to live with him. It therefore cannot be disregarded, as suggested.

2. It remains to consider whether the plaintiff was entitled to maintain the action to remove the deed, so far as it may concern the defendant, because it constitutes a cloud upon the plaintiff's title. Her estate has expired, and become vested in the plaintiff. The deed, so far as respects the defendant, though once vesting in her a title, yet, by the happening of the contingency, has become a nullity. Under these circumstances, a court of equity will interpose, and decree a cancellation of the instrument. Cases occur, says Mr. Justice Story, where a deed or other instrument, originally valid, has, by subsequent events, such as by a satisfaction or payment, or other extinguishment of it, legal or equitable, become *functus officio*; and yet its existence may be either a cloud upon the title of the other party, or subject him to the danger of some future litigation when the facts are no longer capable of proof or have become involved in the obscurities of time. Courts interpose in these cases, although the deed or other instrument has become a nullity: Story's Eq. Jur., sec. 705. That the defendant has deserted her husband, and that she had no just cause for so doing, are extrinsic facts not appearing upon the face of the deed. And although it is alleged in the complaint that the plaintiff has obtained a divorce from the defendant on the ground of her willful desertion, it is evident that her claim under this deed must embarrass him in the disposition of the land, and really constitutes a cloud upon his title: See *Hotchkiss v. Elting*, 36 Barb. 38.

For these reasons we think the complaint stated a good cause of action, and that the demurrer was improperly sustained.

The judgment of the circuit court dismissing the complaint is reversed, and the cause remanded for further proceedings.

LANDS CONVEYED TO HUSBAND AND WIFE ARE HELD BY THEM AS TENANTS BY ENTIRETIES, as at common law, and not by moieties: *Bennett v. Child*, 88 Am. Dec. 692, note 695; *Davis v. Clark*, 89 Id. 471. Neither can dispose of any part of the estate without the other's consent, and the whole remains to the survivor: *Id.*

POWER OF EQUITY TO REMOVE CLOUD ON TITLE BY CANCELLATION OF INSTRUMENT, ETC.: See *Rucker v. Dooley*, 95 Am. Dec. 614, note 620; note to *Munson v. Munson*, 73 Id. 698; *Downing v. Wherrin*, 49 Id. 139; *Lyon v. Hunt*, 46 Id. 216; *Jones v. Perry*, 30 Id. 430; note to *Pettit v. Shepherd*, 28 Id. 441; *Leigh v. Everheart's Ex'r*, 16 Id. 160.

SCHMIDT v. MILWAUKEE AND ST. PAUL R'Y CO.

[28 WISCONSIN, 186.]

NEGLIGENCE CANNOT BE IMPUTED TO INFANT EIGHTEEN MONTHS OLD. — It is utterly incapable of exercising any care or discretion in any matter whatever. As to avoiding danger, its acts are not to be judged by the rules applied to adults. All that can be required is a degree of care or diligence equal to the capacity of the child.

LIABILITY OF RAILROAD COMPANY FOR INJURY TO INFANT FROM FAILURE TO ERECT FENCE. — If an infant eighteen months old gets upon a railroad track in consequence of the failure of the railroad company to erect a fence as required by law, and is run over and injured by a train on the track, the company is liable to it for the injury, if the parents exercised ordinary care in guarding the child.

DAMAGES EXCESSIVE — EIGHT THOUSAND DOLLARS FOR LOSS OF INFANT'S RIGHT ARM ARE NOT. — Judgment on verdict for eight thousand dollars damages for loss of infant's right arm, in consequence of being run over by the train of a railroad company which failed to erect a fence as required by law, will not be reversed for excessive damages, there being nothing to show that the jury acted under improper influence or bias in the matter.

PLAINTIFF, an infant, brought this action by his guardian *ad litem*, to recover for injuries to his person in consequence of his being run over by a train on the defendant's track. Verdict for the plaintiff for eight thousand dollars. A motion for a new trial was made on the ground of error in the refusal of the court to nonsuit the plaintiff, erroneous instructions, verdict contrary to law and the evidence, and excessive damages. This motion was denied, and the defendant appealed from a judgment on the verdict. Other facts are stated in the opinion.

John W. Cary, for the appellant.

Smith and Salomon, for the respondent.

By Court, COLE, J. The jury must have found, under the instructions of the court, that the parents of the child were free from fault or negligence in allowing the infant to stray upon the railroad track. For the court specifically instructed the jury that, if they found from the evidence that the injury to the plaintiff was caused by the neglect of the defendant or its agents, while the parents of the plaintiff were in the exercise of ordinary care in guarding the plaintiff, then they should find for the plaintiff. The same proposition is substantially embraced in other parts of the charge,—that if the negligence of the parents, or of those whose duty it was to watch the infant, contributed to produce the injury, no recov-

ery could be had. The jury were told that they must consider all the circumstances appearing in the evidence, in order to determine whether the parents had exercised ordinary care in guarding the child or not; and this was undoubtedly correct. As was forcibly argued by the counsel for the plaintiff, in determining this question of negligence, the condition of the family, the season of the year, the place of the accident, the probability that it would happen, and all the surrounding facts and circumstances, were proper matters to be considered by the jury; and they must have found from the whole evidence that the parents were free from fault or negligence.

Then, we think the ruling of the court below correct upon another proposition, which has been very elaborately discussed by counsel,—that is, whether an infant of only eighteen months old must be judged by the same rule as an adult, when exposing himself to danger. In denying the motion for a nonsuit, the court evidently was of the opinion that negligence could not be predicated upon the conduct of an infant of that age. But the counsel for the company insists that this is an erroneous view of the law, and that the correct rule upon the subject is, when an infant brings suit for injuries received, that he is bound to show himself free from all negligence, or want of proper care tending to produce the injury the same as an adult. He argues and claims that all plaintiffs suing for such injuries stand upon the same ground, and are subjected to the same rules; and that, so far as the right of recovery is concerned, whatever would be negligence or want of proper care in an adult, is negligence or want of proper care in an infant. We are not prepared to yield our assent to the soundness of such a proposition, even though cases may be found which seem to sustain it. An infant of the age of eighteen months is utterly incapable of exercising any care or discretion in any matter whatever. He is incapable of comprehending the imminent danger of remaining on a railroad track when a train of cars is approaching. He is necessarily incapable of exercising any judgment or forethought, can neither apprehend the danger to which he is exposed, nor take suitable means to protect himself against it. Negligence cannot properly be imputed to him, since he knows nothing of care or diligence or danger. And to say that he is bound to the same legal rules in regard to the exercise of care and diligence in avoiding danger, and escaping the consequences of neglect on the part of others, which are applied to persons of full age and capacity, seems to

us a most unreasonable doctrine. Reason, principle, and the weight of authority, we think, sanction a different rule. Most of these cases where this question is discussed are cited on the brief of the counsel for the plaintiff; and we are content to refer to the reasonings in those cases upon the point we are considering. They fully vindicate both the soundness and humanity of the doctrine that negligence cannot be imputed to the conduct of an infant of such tender years as the plaintiff, and that in respect to his acts he is not to be judged by the same rules which are applied to an adult. All that is demanded in such cases is a degree of care or diligence equal to the capacity of the child. In addition to the authorities cited by counsel upon this point, see *Whirley v. Whiteman*, 1 Head, 610; and Angell on Highways, sec. 347. And this brings us to the point in the case which presents the greatest difficulty.

The child was, in the month of August, 1865, run over by a gravel train of the defendant, and lost his right arm in consequence of the injury so received. The railroad track ran across the farm of the plaintiff's father, some forty or forty-five rods from the dwelling-house. The road had been in operation a year or more, but the company had neglected to construct any fences along the line of its road at that point. The child was on the track where a path, leading from one part of his father's farm to the other, crossed the railroad. The plaintiff requested the court to give a number of special instructions, the fourth, fifth, and sixth of which were as follows:—

"4. The defendant was guilty of negligence in failing to fence its road across the land in question.

"5. If the jury find from the evidence that the want of a fence was the cause of the injury, without negligence of plaintiff's parents contributing thereto, they must find for the plaintiff.

"6. If the jury find from the evidence that, owing to the want of a fence, this part of the road over the land in question was unsafe, and accidents more liable to occur there than where the road was fenced, and that the company had notice of this fact, then it was the duty of the defendant to use more than ordinary care and diligence to prevent such accidents, and to run their trains with reference to this consideration."

These instructions the court gave under exceptions, and also gave, at the request of the defendant, this instruction: "That the plaintiff cannot recover for the negligence of the defendant in not building said fence, unless you find that the

injury happened without the fault of the plaintiff, and in consequence of the neglect to build the fence, and that the fence would have prevented it."

Now, considering these various instructions together, so far as they bear upon the question of the liability of the company arising from the fact that it had neglected to build a fence along the road at that place, they simply amount to this proposition: that though the defendant was guilty of negligence in failing to fence its road across the land in question, yet this fact would not authorize a recovery, unless the injury happened without the fault of the plaintiff's parents contributing thereto, and in consequence of the neglect to build the fence, and the fence would have prevented the accident.

Assuming, then, these facts to exist, as we must, after the verdict,—that the parents exercised ordinary care in protecting the child; that the company neglected to build a fence along its road at that place, as the law required; and that the child was injured in consequence of this neglect, the question arises, In such a case is not the company liable? The counsel for the company says that the failure to build a fence subjected the defendant to certain liabilities in case of an injury to cattle, horses, or other domestic animals; and that in case of injury to passengers, happening in consequence of not fencing the road, certain other liabilities would attach; but that fences were never intended to keep men, women, or children off the track, and are utterly useless for any such purpose.

In answer to this argument, it must, in the first place, be remembered that the statute imposes upon all railroad companies of this state the positive duty of erecting and maintaining good and sufficient fences on both sides of their roads, with gates or bars therein, and farm-crossings for the use of the proprietors of the adjoining lands. This is a clear, distinct, and precise legal duty imposed by the legislature; and the failure to perform it by the company in this case was the sole cause of the injury. For the jury, in effect, found that a fence would have prevented the accident. The facts in this case show that for more than a year the company had run its trains over the road, neglecting all the while to build a fence at that place,—omitting to do what not only the law required, but common prudence demanded should be done, as well for the protection of persons traveling on its road as for the security of the domestic animals of those residing along the

track, and the safety of children exposed to its dangers, who were incapable of taking care of themselves.

Now, when the company neglected to perform this duty, did it not necessarily assume responsibility for all damages which might result from that cause? Can the court make an exception to this general liability, when an infant is injured solely in consequence of the want of a fence, no negligence of the parents contributing thereto? Would it not be an unwarrantable restriction of the statute to hold that the duty imposed upon the company of maintaining a fence along its road had no reference to such children? If one were to look at the mere verbiage of the last part of the first section (chapter 268, Laws of 1860), he might conclude that the object of the law was solely for the protection of domestic animals. And yet the courts have held that the law has a broader application, being in the nature of a police regulation, intended mainly to secure the safety of passengers upon railroad cars: *Blair v. Milwaukee and Prairie du Chien R. R. Co.*, 20 Wis. 254, and cases there cited. Hence, where a passenger, without fault on his part, is injured in consequence of the cars being thrown from the track by cattle passing onto the same at a place where the company ought to maintain a fence, he can recover for all damages sustained, without other proof of the negligence of the company. And this recovery is had in such a case upon the ground that when the company neglects to perform a duty imposed by the statute, it "necessarily assumes responsibility for all damages which may ensue from that cause." Thus a liberal construction has already been placed upon the statute, for the purpose of furthering the important and beneficial objects of its enactment. It has been extended to cases which, if not clearly within the letter, are certainly within the spirit of the law, as when it was applied to the case of a passenger injured in consequence of a failure of the company to fence its road. And it is in strict harmony with the principle and reasoning of these cases to say that the statute also embraces a case like the one before us.

Here, if the fence had been erected, the accident would not have happened. Solely and entirely from the omission of the company to perform this clear, positive, absolute duty, the plaintiff is maimed and deprived of his right arm. Had it been an ox or horse, or some other domestic animal, which had been injured by the failure to erect the fence, the liability of the company would be clear and absolute, regardless of the

question whether the owner had been guilty of negligence. Can it be, then, a perversion of the intent of the statute to hold the company liable for a breach of the same duty, when a helpless infant is injured, without any fault on the part of the parents? It appears to us not. In *Wakefield v. Connecticut etc. R. R. Co.*, 37 Vt. 330 [86 Am. Dec. 711], where a statute required the bell on locomotive engines to be rung, or the whistle blown, for a certain distance at crossings, the court held that this duty was imposed upon railroad companies, not only in reference to persons approaching or in the act of crossing the track, but in reference to all persons who, being lawfully at or in the vicinity of the crossing, might be subjected to accident and injury by the passing train. In that case, the plaintiff had crossed the track and driven about thirty-five rods south when a train of freight cars came over the road from the south, and was within five or six rods from the plaintiff's team, when first discovered by him and his horses. The forward pair of horses, being greatly frightened, instantly turned back with such force as to break their fastenings to the other horses, and ran back to the crossing, where they were injured by the passing cars. The court, while holding that the connection of the failure to blow the whistle or ring the bell with what did happen seemed very slight, yet could not for that reason say that the company was not responsible for any injury caused by an unwarrantable omission to perform the duty imposed by law.

In *Singleton v. Eastern Counties R. R. Co.*, 7 Com. B., N. S., 97 Eng. Com. L. 287, it seems to be assumed by the judges that, if the children had strayed upon the railroad track through the fence, at a place where a rail was off, which fence the company was bound to keep in repair, this would be such an act of negligence as would render the company liable. Mr. Justice Williams says: "There was nothing to show how the children got on the railway. All was mere conjecture and surmise." But the fair inference from the case is, that if it had appeared that the child passed onto the track through a defective fence which the company was bound to keep up, then the action might have been maintained.

In this case, the connection between the omission of the company to perform its duty and the accident which happened, is direct, clear, and certain. If the company had built a fence at that place, the child would not have been injured. So the jury must have found, under the instructions. Upon

such a state of facts, we are unable to say that the company is not liable for the damage sustained.

The sixth instruction, above cited, calls for no special remark. We think it substantially correct.

It was further insisted that the judgment should be reversed because the damages are excessive. The jury gave a verdict for eight thousand dollars. It is of course difficult for any one to estimate the real amount of damages which the child has sustained in consequence of the loss of his arm. The question was one peculiarly proper for the jury to determine. We cannot interfere, unless the excess is so great that we can say the jury must have acted under some improper influence or bias in the matter. This we cannot say.

There are many other points discussed in the arguments of counsel, but we do not deem it necessary to notice them. The questions which we have noticed are the controlling ones, and dispose of the cause.

The judgment of the county court is affirmed.

DIXON, C. J., dissented.

NEGLECT, RULES OF, AS APPLIED TO CHILDREN OF TENDER YEARS: See *Rauch v. Lloyd*, 72 Am. Dec. 747, note 757; *East Tennessee etc. R. R. Co. v. St. John*, 73 Id. 149; *Smith v. O'Connor*, 86 Id. 582, note 587; *Lafayette etc. R. R. Co. v. Huffman*, 92 Id. 318, 321; note to *Sheridan v. Brooklyn etc. R. R. Co.*, 93 Id. 494; *Pittsburgh etc. R'y Co. v. Bumstead*, 95 Id. 539. These cases also show the liability of railroad companies for running over such children.

PARENTS' NEGLIGENCE, WHETHER IMPUTABLE TO CHILD: See *Pittsburgh etc. R'y Co. v. Bumstead*, 95 Am. Dec. 539, note 543; note to *Philadelphia etc. R. R. Co. v. Hummell*, 84 Id. 460; note to *Smith v. O'Connor*, 86 Id. 587; *Holly v. Boston Gaslight Co.*, 69 Id. 233.

FENCES, DUTY OF RAILROAD COMPANY TO ERECT, AND LIABILITY FOR FAILURE WHERE FENCE IS REQUIRED BY LAW: See *Brown v. Milwaukee etc. R'y Co.*, 91 Am. Dec. 456; *St. Louis etc. R. R. Co. v. Linder*, 89 Id. 319; *Russell v. Hanley*, 89 Id. 535; *Gorman v. Pacific R. R.*, 72 Id. 220.

EXCESSIVE DAMAGES, SETTING ASIDE VERDICT ON GROUND OF: See *Doyle v. Dixon*, 93 Am. Dec. 80, note 85; *Baker v. Young*, 92 Id. 149; *Ross v. Insula*, 85 Id. 373, collected cases in note thereto 381.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: A verdict will not be disturbed as excessive where it bears no marks of passion, prejudice, or corruption on the part of the jury: *Rogers v. Henry*, 32 Wis. 332; *Stewart v. City of Ripon*, 38 Id. 592; *Goodne v. City of Oshkosh*, 28 Id. 305; *Karasick v. Hasbrouck*, 28 Id. 577. The sentence in the principal case suggesting that in case of injury to a domestic animal "by the failure to erect the fence, the liability of the company would be clear and absolute, regardless of the question whether the owner had been guilty of negligence," was pronounced purely obiter in *Curry v. Chicago etc. R'y Co.*, 43 Id. 677.

AKERLY v. VILAS.

[28 WISCONSIN, 307.]

ACTS CONSTITUTING BREACH OF COVENANT FOR "QUIET AND PEACEABLE POSSESSION," AND SLANDER OF PURCHASER'S TITLE—EQUITIES OF PURCHASER ARISING THEREFROM AS TO ACTUAL DAMAGES IN SUIT TO FORECLOSE MORTGAGE FOR PURCHASE-MONEY.—V. bought of A. unimproved city lots, at a speculative price, with the expectation, known to A., of reselling them at an advance, should a railroad depot be located near them. The depot was so located, and A. brought suit to set aside his deed, alleging that it had been obtained by fraud. He also procured himself to be made a defendant in an action for the partition of lands, his interest in which had passed to V. by the terms of said deed, and by his answer therein denied V.'s title. In consequence of these acts, V. was prevented from selling said lots at the prices then ruling, and until prices had greatly depreciated, when A. discontinued the action to set aside his deed, and withdrew his answer in the partition suit. A. then brought an action to foreclose V.'s mortgage for the purchase-money. *Held*, that said acts were a breach of A.'s covenant for "quiet and peaceable possession," and that V. was equitably entitled to have the actual damages resulting to him from said acts of A. deducted from the mortgage debt.

BESIDES the facts stated in the *syllabus, supra*, the court ruled out all evidence offered to sustain defendant's allegations as to a malicious denial and slander of his title by the plaintiff in his complaint in the United States district court, in which he sought to have the conveyance to defendant set aside on the ground that it was procured by fraud; and in his answer filed by him in the suit brought in the circuit court for Crawford County for a partition of the lands held by the Prairie du Chien Land Company No. 2. It also ruled out all evidence as to damage resulting to defendant from the plaintiff's pleadings and proceedings in said suits; and by its instructions took away the subject of such damage from the consideration of the jury. Verdict for the plaintiff for \$21,218. Motion for new trial was denied. Defendant appealed from judgment upon the verdict. Other facts concerning the points decided are sufficiently stated in the opinion. For prior proceedings and facts in this case, see *Akerly v. Vilas*, 21 Wis. 88.

William F. Vilas, and Spooner and Lamb, for the appellant.

Finches, Lynde, and Miller, for the respondent.

By Court, DIXON, C. J. The question of the breach of the covenant for quiet enjoyment by the prosecution by the plaintiff of the action in the district court of the United States to set aside the deed, and by his defense in the partition suit,

and the question of the equities of the defendant, Vilas, growing out of the same prosecution and defense, to reduce or extinguish the demand of the plaintiff, are wholly untouched by the former decisions of this court. This will appear from an examination of those decisions as reported in 15 Wis. 401, and 21 Id. 88. To say nothing, therefore, of the rights of the defendant arising from the refusal to deliver the certificates of stock in the land companies, which is the point upon which I dissented from the last decision, and on which, as it seems to me, that decision directly conflicts with the first, we have these two questions still open and undecided; and since with regard to them the court have come to a unanimous conclusion favorable to the defendant, it will become unnecessary for us to consider any of the other questions argued in the case. On these two, we are of opinion that the answer states valid grounds of defense, in support of which the evidence offered by the defendant should have been received.

Of the authorities cited by the learned counsel for the plaintiff, on the first question, it is only necessary to observe that none of them were cases involving the question here presented. They were all cases where suits had been brought or title claimed by a third person, or one not bound by the covenants of the deed. They are not, therefore, evidence of what the opinion of the court was, or would have been, of the question here involved, had the same been presented; and the general remarks of the court, quoted by counsel, are, by a familiar rule in the interpretation of judicial decisions, not to be applied beyond the facts of the case in which they are made, unless the new case, though varying somewhat in its facts, clearly authorizes such application. It is undoubtedly true that no action will lie for a breach of the covenant for quiet enjoyment, where the title is claimed or suit commenced against the covenantee by a stranger to the deed, without alleging and proving an actual eviction or ouster. The covenant is not understood to protect the grantee against every such claim or suit, however unfounded, and for which the covenantor is in no way responsible. In such case, it is only upon a lawful eviction or ouster, on a valid title existing before or at the date of the covenant, that the grantee has his remedy for the breach; and to this effect merely are the authorities cited. But in this case the question is, whether a suit to avoid the deed and regain possession of the land, commenced by the covenantor himself, with "no reasonable or probable cause

of action," as alleged in the answer, and prosecuted "willfully, wrongfully, and maliciously," to the great pecuniary damage and loss of the covenantee, is a breach of the covenant. We are satisfied that it is, and that the distinction between such a suit, as constituting a breach, and suits by third persons, is both on reason and authority precisely that claimed by the learned counsel for the defendant. And on this point we are content to leave the question where the argument of counsel leaves it, merely adding that we feel obliged, when, by the research and learning of counsel, in the examination of a question of such intricacy and importance, we are relieved from the labor of entering upon the investigation for ourselves.

And the same observation may be made of the other question. The equities of the defendant, growing out of the wrongful prosecution of the action in the district court, and of the defense in the partition suit, are placed in so clear a light by the argument that they cannot be made clearer by us. It seems impossible, on the facts stated, that a purchaser may be thus wantonly harassed and vexed by his grantor, his title disturbed and rendered worthless, and all profits and advantages of his purchase lost, and yet when sued by the grantor in a court of equity for the purchase-money, he should have no remedy for the injuries he has sustained. We do not think this can be so, but on the contrary, by the general principles governing the court, that the defense in this respect is good. He who asks equity must do equity. Any conduct on the part of the plaintiff with regard to the subject of the action, which was inequitable or unjust toward the defendant, and resulted in actual damage to him, and especially when such damage was caused vexatiously or intentionally by the plaintiff, may always be shown as matter of defense in a court of equity.

On the question of the position of the defendant here being inconsistent with that occupied by him in the former suits, it is obvious, with respect to these defenses, that it is not so. His title was then disputed, and he was charged with fraud. He insisted that he had good title, and denied the fraud. The plaintiff, by his voluntary discontinuance of the action to rescind, confessed that it was unfounded, or prosecuted without probable cause. At least it would be so held in an action for malicious prosecution: See *Burhans v. Sanford*, 19 Wend. 417, and cases cited. The plaintiff, then, by the discontinuance

of his former action and the commencement of this, has in fact changed his position, while the defendant, with respect to the questions we are considering, has not. The defendant alleges that in the prosecution and defense by the plaintiff of the actions in which his (defendant's) title was denied, but which he then insisted upon, and which the plaintiff has since confessed that he had, the plaintiff was guilty of a breach of his covenant for quiet enjoyment, and caused damages to the defendant, which, in the judgment of a court of equity, ought to be deducted from the demand of the plaintiff for the purchase-money. In this there is certainly no inconsistency on the part of the defendant.

The judgment of the circuit court is reversed, and the cause remanded for further proceedings according to law.

COVENANTS FOR QUIET ENJOYMENT RUN WITH LAND: See note to *Morse v. Garner*, 47 Am. Dec. 571, showing when such covenants are broken. See also note to *Surget v. Arighi*, 49 Id. 46, as to the latter point.

ACTION FOR SLANDER OF TITLE: See note to *Gent v. Lynch*, 87 Am. Dec. 562.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: It is well settled at common law that a covenant for quiet enjoyment is implied in every mutual contract for the leasing and demise of land by whatever form of words the agreement is made; and for the breach of such covenant occasioned through any fault of the lessor, the lessee has his remedy against the lessor for whatever damages he may have sustained. And the same rule applies with respect to damages sustained by the covenantee in a deed, when such damages are caused by the wrongful acts or misconduct of the covenantor in breach of the covenant for quiet enjoyment contained in the deed: *Eldred v. Leahy*, 31 Wis. 551. A party is not precluded or estopped by the mistaken views or oversight of former counsel, so long as the question is an open one, or has not passed into judgment against him. This rule has often been applied in a long and complicated litigation which has exhausted the learning and resources of various counsel, without avail, but where other counsel have been employed, who, upon the presentation of some new proposition or different principle of law applicable to the case, have at once brought the controversy to a successful termination. Thus, in a former suit by the present defendants against the present plaintiff, the complainants therein sought to compel the execution of a new lease in form for ninety-nine years, and the defendant in that suit, the plaintiff herein, demurred to that bill on the ground that the covenant to renew was a personal covenant of the original lessors, and did not bind him; but these facts, and the determination of the court in that suit, that "the covenant to renew the lease ran with the land, and bound the defendant as assignee of the reversion," do not estop the present plaintiff from now claiming that said lease was a demise for the ninety-nine years, which took effect upon the giving of due notice by the lessees: *Orton v. Noonan*, 27 Id. 291. An assault upon the title of another, to be actionable, must be made maliciously, and without probable cause. If so made, it may amount to slander of title, and be action-

able, and the damages may be increased by unnecessary delay in prosecuting the action. The rule is, that "language concerning a thing is actionable when published maliciously, i. e., without lawful excuse, if it also occasions damage to the owner of the thing": *Failes v. City of Milwaukee*, 47 Id. 498.

HALE v. MILWAUKEE DOCK COMPANY.

[28 WISCONSIN, 276.]

WAREHOUSEMAN IS ESTOPPED FROM DENYING DESCRIPTION OF PROPERTY IN RECEIPT, so far as it relates to matters which are or ought to be within his knowledge or that of his agents; but not in respect to matters not open to ordinary inspection, and visible, and where a local custom requires that the kind of property described in the receipt must, for the purpose of purchase and sale, either have a well-known brand, or be inspected, as a condition of purchase, and that purchasers rely on the warehouse receipt only for custody, and not for quality or kind.

ACTION by the holder of a warehouse receipt to recover the value of a certain number of barrels of mess pork. The defendant received in store from one White, a pork-packer in Milwaukee, fifty-four barrels, marked "mess pork," and branded with White's name as packer, but which in fact were found to contain only salt. The warehouse receipt issued by the defendant was in the following form: "Received in store from McLaren, for account of bearer, fifty-four barrels mess pork, deliverable on the return of this receipt and payment of storage"; and it did not show that the pork was packed by White. The plaintiffs took the receipt for value in the usual course of business, and afterward demanded of the defendant fifty-four barrels of mess pork, which the latter refused to deliver, but offered to deliver the same barrels received in store, and for which the receipt was given. The plaintiffs refused to accept, and brought this action. The defense was, that the property, when received in store, was not open to inspection, and that it was so received, and the receipt issued, in good faith on the defendant's part, and that the holder of the receipt was only entitled to the property actually stored, and intended to be described in the receipt. Certain evidence offered by the defendant on the trial, and appearing in the opinion, was ruled out, and the jury found a verdict for the plaintiffs, as directed by the court. The defendant appealed.

E. Mariner, for the appellant.

Finches, Lynde, and Miller, for the respondents.

By Court, COLE, J. Among the various offers of evidence made by the defendant on the trial was the following: An offer to prove that among all persons purchasing and dealing in the article of pork, in the city of Milwaukee, which has been warehoused, there is no inspector appointed by the chamber of commerce, but that parties purchasing either require warehouse receipts for the brand of a well-known packer in the city, and buy upon the credit and reputation of the packer, or that, where the commodity is packed by a person whose reputation is not a guaranty of the quality of the article, it is the uniform course of parties so dealing to require an inspection of the commodity to attend the purchase, and be a condition of the purchase; and that parties rely upon the warehouseman's receipt only for the custody of the property, and not for the quality or contents of barrels; and that Mr. White's brand was one of those where an inspection or examination would have been required before a purchase would have been made; such examination to be made, not by the warehouseman, but by an inspector.

This evidence was objected to, and ruled out by the court. Was the evidence admissible? We are inclined to hold that it was.

The objection to all this kind of evidence is, that as the defendant has given certain warehouse receipts, in which it is stated that it has received in store so many barrels of "mess pork," deliverable on return of the receipts and payment of storage, it is bound by this representation as to the contents of the barrels stored, at least so far as the plaintiffs are concerned, who have advanced money relying upon these representations, even though the barrels were fraudulently filled with salt or sand, instead of pork, by the packer. It is said that these receipts have a qualified negotiability, which excludes such defenses. The defendant is a company organized under a charter (Private Laws of 1864, c. 424), authorized to receive upon storage, deposit, or otherwise, grain, flour, and provisions, and to advance money, give receipts upon any property so stored or deposited with it. Such warehouse receipts, the charter declares, shall be deemed, in the hands of the holder thereof, *prima facie* title to the ownership of the property stored, both in law and equity: Sec. 5.

Now, it seems to us that the defendant, being a warehouseman, may well be estopped, as against one who takes the warehouse receipt for a valuable consideration, from denying the

truth of the statements to which it gives credit by its signature, so far as those statements relate to matters which are or ought to be within its knowledge or the knowledge of its agents; but that in respect to things not open to inspection, and visible, like the contents of pork-barrels, it ought not to be concluded by the description of the property in the receipt. This is the rule applied in the case of receipts or bills of lading given by common carriers, as to the interior condition of the property shipped: *Hastings v. Pepper*, 11 Pick. 41; *Shepard v. Naylor*, 5 Gray, 591; *Tarbox v. Eastern Steamboat Co.*, 50 Me. 339; *Bissel v. Price*, 16 Ill. 408; *Bradstreet v. Heran*, 2 Blatchf. 116; and *Nelson v. Woodruff*, 1 Blackf. 156; and we cannot see why it is not also applicable to the case at bar. But it is said that these are cases arising between the original parties to the bill of lading, and that an entirely different principle of law controls in respect to these receipts issued for products which are intended for sale in the market, when in the hands of an innocent holder who has advanced his money upon them. So far as an innocent third party is concerned, it is claimed that the receipt obligates the defendant to fulfill the contract and deliver the property therein described, whether in fact that property was delivered to it for storage or not; in other words, that the defendant cannot discharge its contract by delivering to the plaintiffs the identical barrels, with their contents, which were actually bailed, but must deliver mess pork. But however this might be under other circumstances, we think no such principle of law obtains when it appears that, by the uniform course of dealing in the article of pork in Milwaukee, parties purchasing require either a receipt for the brand of a well-known packer, and buy upon the credit of such packer, or, when this is not the case, require an inspection of the article as a condition of the purchase, only relying upon the warehouse receipt for the custody of the property, and not for the quality or contents of the barrels.

It was proposed to show, on the part of the defendant, that in respect to the articles of wheat and flour the custom was to require them to be inspected by a person appointed by the chamber of commerce; and that warehousemen give receipts upon such inspection as to the quality and kind of article, and that parties buy relying upon that inspection as stated in the receipt; but that with the article of pork it was otherwise. Now, in the former cases, if a warehouseman, without an inspection having been made, should issue receipts specifying

the quality and quantity of the commodity, there would be no hardship in holding that he was estopped by his representations; for it would be his own fault if he gave receipts stating the quality, when no examination had been made. But why should the doctrine of estoppel be applied in a case where a party does not purchase the article relying upon the representations in the receipt in respect to the quality, but requires a receipt for the brand of a well-known packer, or else that an examination of the commodity be made at the time of the purchase? For we must assume that the plaintiffs purchased the pork like other purchasers in that market, relying, not upon the faith of the representations in the receipt, but upon something else. If, in accordance with the course of dealing in Milwaukee, Mr. White's brand was one of those where an inspection would be required before a purchase, why did not the plaintiffs see that it was made? It will not do for them to say that they relied upon the representation of the receipt, because the offer was to show that as to the pork the receipt was only relied upon by purchasers for the custody of the property, and not for the quality or contents. In our opinion, the principle of estoppel would not apply to such a case, and preclude the defendant from showing that there were concealed defects in the pork.

It is admitted that the receipts were effectual to transfer the title to the plaintiffs of the parcels and barrels stored with the defendant. The defendant alleges that it is willing to deliver these barrels with their contents, in discharge of its contract. Should the facts be established which the defendant offers to prove, this is all the plaintiffs have a right to insist upon. The error of the court in excluding the evidence offered must reverse this case; and it becomes unnecessary to decide the other questions discussed by counsel.

The judgment of the circuit court is reversed, and a new trial awarded.

A new trial resulted in a verdict for the plaintiffs, and the defendant appealed from the judgment rendered thereon: *Hale v. Milwaukee Dock Co.*, 29 Wis. 482. The question and judgment on the second appeal were the same as on the first. On the second appeal, Dixon, C. J., in the opinion, says: "This cause was most ably and exhaustively argued at the bar on both sides, as well on the first appeal as on this; and I thought at that time, and so I still continue to think, that the tender or offer by the defendant to deliver to the plaintiffs the same parcels and barrels received by the defendant in store, and for which the receipt was given, was, and is, a discharge of the obligation of the defendant, and full satisfaction and performance of the con-

tract on its part." It was held that a warehouse receipt is a written simple contract, which binds the receptor merely to safely store the goods, and to deliver the same goods to the bailor or his assignee of the receipt, except in those cases where there is some express agreement or known usage of trade which shows that the parties otherwise intended; that such receipt is negotiable only to the same extent and for the same purposes as a bill of lading or a carrier's receipt; and that the indorsement and delivery of it does not convey the contract itself, but only the property represented by it, and it becomes a mere evidence of the title of the holder in such property. The plaintiffs moved for a rehearing, asking a decision whether warehouse receipts were not negotiable by statute, chapter 340, Laws of 1860, and the amendment thereto. The motion was denied, and the court pointed out the real object and intent of the statute; holding, however, that it did not render warehouse receipts negotiable in the sense in which bills of exchange are negotiable by the law merchant, nor estop the warehouseman from denying, as against an innocent transferee for value, that the property therein described, according to its external appearance and the representations of the original bailor, was really such as represented: *Id.* 500. But see this answer to the motion for a rehearing criticised in *Price v. Wisconsin etc. Fire Ins. Co.*, 43 Wis. 283, 284, where it is said that, in the case of *Hale v. Dock Co.*, "the court was as much bound to recognise the negotiability of warehouse receipts under the warehouse-receipt act as the negotiability of promissory notes under the statute of Anne."

WAREHOUSE RECEIPTS, NATURE OF: *Burton v. Curyea*, 89 Am. Dec. 350; their transfer and negotiability: *Id.* 361, note; *Rice v. Cutler*, 84 *Id.* 747, and note.

WHEN CORN OF DIFFERENT OWNERS BLENDED IN WAREHOUSE FALLS SHORT OF AMOUNT PUT IN, and for which warehouse receipts are given, the holders of the receipts must share the loss proportionately: *Dole v. Olmstead*, 89 Am. Dec. 386, and note 387.

PURCHASER OF WAREHOUSE RECEIPT FOR GRAIN SUBJECT TO CHARGES FOR STORAGE WILL BE PERSONALLY BOUND FOR STORAGE: *Cole v. Tyng*, 76 Am. Dec. 735.

FELLER v. ALDEN.

[28 WISCONSIN, 301.]

WIFE MAY CULTIVATE LAND OWNED BY HER AS HER SEPARATE ESTATE, by means of the labor of her husband and their minor children, without divesting herself of the legal title to the products, so as to subject them to levy under an execution against the husband.

EMPLOYMENT OF HUSBAND BY WIFE TO CULTIVATE HER LAND IS NOT ITSELF PROOF of an arrangement to defraud his creditors.

WIFE'S MONEY DOES NOT BECOME PROPERTY OF HUSBAND when she places it in his hands to be invested for her.

REFLEVIN. The defendant, as sheriff, levied upon the property in dispute under an execution against the plaintiff's husband. The verdict was for the plaintiff, and the defendant appealed. The opinion sufficiently states the case.

E. Hurlbut, for the appellant.

Small and Westover, contra.

By Court, COLE, J. The charge of the court on some points contained substantially propositions the opposite of those embraced in the defendant's instructions. The jury were told that if they were satisfied beyond a reasonable doubt from the testimony that the farm on which the chattels in controversy were seized was purchased and paid for by money belonging to the plaintiff, and the deed taken in her name, then the property belonged to the as her separate estate, and that neither her husband nor his creditors were entitled to the same, nor to any portion thereof; that the plaintiff was entitled to all the rents, issues, and profits of the farm; that this included the crops and the stock grown thereon, and the proceeds of them, and all property for which she might have exchanged them. This was in effect charging in the express language of the statute, which declares that the real estate of the wife, and the rents, issues, and profits thereof, shall be her sole and separate property, as if she were a single woman. The jury were to be satisfied beyond a reasonable doubt that the farm was really the separate property of the wife, purchased with money belonging to her; and this fact being established, then the wife could recover the property seized upon the execution against her husband. Thus far the case would seem to be clear and free from all doubt. But it appears that the plaintiff has permitted her husband to occupy the farm as a homestead, and he has expended his time and labor, as well as the labor of the minor children, in managing the farm, cultivating and securing the crops, and attending to the stock. The court charged the jury that although the husband and children worked the farm, and were the only persons who cultivated it, still the produce raised on the farm, and the proceeds of such produce, belonged to the plaintiff, unless she had transferred them in some form to her husband; but that the jury were not at liberty to find such transfer from the mere fact that the husband was simply supported by the plaintiff, and that he worked on the farm.

Is this view of the law correct? As applied to the facts of this case, we are inclined to hold that it is. For if the farm were really the separate estate of the wife, as we have already said, the statute expressly declares that she may hold and enjoy it, with the rents and profits, in the same manner and

with the like effect as though she were unmarried. It would seem to follow from this that she might cultivate the farm, and manage the personal property, by means of any agency which any other owner of such property might employ, and the produce thereof, with the increase of stock, would belong to her: *Knapp v. Smith*, 27 N. Y. 277; *Buckley v. Wells*, 33 Id. 518; *Owen v. Cawley*, 36 Id. 601. And that she is at liberty to avail herself of the agency of her husband to manage her separate estate is a proposition fully sustained by the above authorities. She may employ him to manage her farm without forfeiting her rights in the products; nor will the law imply, from the mere fact that she does employ him, that she has given up and surrendered to him the ownership in the rents and profits. But it is said that the wife is not entitled to the labor of her husband, and that, so far at least as his personal services enter into or contribute to the products, she has no right to the benefit of them as against his creditors. But even if the husband's labor did produce the crops upon the plaintiff's farm, this would not divest her of the legal title to the crops so as to subject them to a levy on an execution against the husband. Unless this were so, it would follow that she could not employ her husband to work the farm and attend to the crops without forfeiting her legal title to the rents and issues of her separate estate. But when the husband's labor and expense produce the crops upon his wife's farm, perhaps a court of equity, upon the application of his creditors, would make an apportionment of the products as between the fair rent and use of the capital of the wife and the value of his personal services, so as to give the creditors the benefit of his industry. Some such relief was granted in *Glidden v. Taylor*, 16 Ohio St. 509; and the doctrine of that case seems reasonable and equitable. However, we think the remedy of his creditors, if they have any, to reach the profits of the husband's labor in the case, is in a court of equity, which can so mold the relief as to protect the wife in the full enjoyment of her separate estate. She ought not to be held to have lost all her rights in the products of the farm, merely because she has employed her husband to work upon it, and because his services may have contributed to the accumulations.

If his creditors can have the full benefit of his labor by a fair and just apportionment of the products, it is as favorable a position as they can assume. Upon the trial the defendant

offered to prove that the husband of the plaintiff carried on the farm; that he, with his wife and family, did all the work upon it, and at his expense produced and raised the wheat and oats levied on by the officers. But this evidence was excluded, and, as we think, rightfully; for even if all this were true, the legal title of the wife was not thereby diverted so as to subject the property to a sale upon an execution against the husband. The farm being her separate estate, the issues and proceeds thereof belonged to her, except, perhaps, such a portion as a court of equity might, under the circumstances, apply to the payment of his debts, it being the result of his expense and labor. On this point, that the law will not tolerate any arrangement by which the husband becomes the servant or agent of the wife in the management of her property, we were referred by the counsel for the defendant to *Sherman v. Elder*, 1 Hilt. 476. That case, however, came before the court of appeals in 24 N. Y. 881, and was reversed. But the doctrine of that court, even in this case, was more restricted than in the subsequent cases above cited, where the law is distinctly laid down, that a married woman having a separate estate can manage it by the agency of her husband, or any other, and hold the profits and increase to her own use.

Of course the law will not tolerate any arrangement between the husband and wife resorted to for the purpose of covering up his property, and to defraud his creditors. But the mere fact that the husband works upon the wife's farm would not constitute any such fraudulent arrangement, because, the property being hers, she has the right to employ her husband to manage it for her. The second instruction asked by the defendant was too broad in its language, applying to a case where the business was conducted in the manner proven, for the purpose of covering up the proceeds of the husband's labor and means, or either.

The error in some of the other instructions is that the wife could not place her money in the hands of her husband, even to be invested for her, without its becoming his property. This is not so. The husband might act as agent for his wife in buying a farm for her and paying her money for it. And when intrusted with her funds for such a purpose, it is incorrect to say that it became his personal property because it was in his possession.

These remarks dispose of the material questions in this case.

It results, from our views, that the judgment of the circuit court must be affirmed.

Judgment affirmed.

PRODUCTS OF WIFE'S SEPARATE ESTATE, AND PROPERTY PROCURED THEREWITH, BELONG TO WIFE, and cannot be reached by her husband's creditors, because the labor of her husband and children entered into the production: *Bush v. Fought*, 93 Am. Dec. 769, and see cases collected in note 774; *Louis v. Johns*, 85 Id. 49; *Wilson v. Wilson*, 95 Id. 194.

WHERE WIFE SUFFERS HER MONEY TO BE EMPLOYED BY HER HUSBAND, and blended with his earnings, so that it cannot be separated therefrom, the most favorable position she can be allowed is that of a preferred creditor in equity, and as such entitled to her money and interest: *Glidden v. Taylor*, 91 Am. Dec. 98.

CREDITOR OF HUSBAND CANNOT SUBJECT TO HIS DEMAND IMPROVEMENTS ON WIFE'S LANDS made by him without any participation by her in any intentional wrong: *Webster v. Hildreth*, 78 Am. Dec. 632, and note 634.

THE PRINCIPAL CASE IS CITED to the point that it is not to be inferred that the husband was tenant, or that he had any legal title to the crops or stock raised upon the wife's land, simply because he worked upon the land and assisted in raising them, in *Boos v. Gember*, 23 Wis. 286; and is cited to the point that the employment of the husband by the wife to work upon her farm, or to act as her agent in the transaction of her business, is not a badge or evidence of fraud as against his creditors, in *Arndt v. Harshaw*, 53 Id. 272; *Dayton v. Walsh*, 47 Id. 118.

WALSH v. DART.

[23 WISCONSIN, 284.]

IT IS PRIMA FACIE EVIDENCE OF LACHES to hold a foreign sight draft fourteen days before sending it forward. But this delay may be explained, and the presumption of laches may be overcome by proof.

UNDER WISCONSIN PRACTICE, WHERE CAUSE IS TRIED BY COURT WITHOUT JURY, the supreme court, on appeal, must determine whether the finding of facts is in accordance with the weight of evidence, although there was no motion for a new trial.

ACTION against the defendants as indorsers of a sight draft upon New York, which was protested. The opinion states the case.

Wheeler and Kimball, for the appellant.

C. K. Martin, for the respondent.

By Court, COLE, J. As this cause was tried by the court without a jury, we are under the necessity of determining whether the finding of facts is in accordance with the weight of testimony, although there was no motion for a new trial:

Fisher v. Farmers' Loan and Trust Co., 21 Wis. 78. The court found that the plaintiff was not guilty of laches in the forwarding or presentment of the bill for acceptance and payment. The bill was indorsed to the plaintiff on the 12th of January, 1865, who retained it until the 26th of that month, when he sent it by mail to his correspondent in New York, for payment. There are no circumstances appearing in the case to excuse this delay. *Prima facie*, we think the plaintiff was guilty of negligence in holding the bill fourteen days before sending it forward. This delay may be explained, and the presumption that the plaintiff was guilty of laches may be overcome by proof. The plaintiff was bound to use reasonable diligence in forwarding the bill according to the ordinary course of business: *Edwards on Bills and Notes*, 386 et seq.; *Mohawk Bank v. Broderick*, 13 Wend. 133 [27 Am. Dec. 192]; *Prescott Bank v. Caverly*, 7 Gray, 217 [66 Am. Dec. 473]; *Phoenix Ins. Co. v. Allen*, 11 Mich. 501 [83 Am. Dec. 756]. What is reasonable diligence is a mixed question of law and fact, to be decided by the jury under proper instructions. But when the facts are admitted and clear, it is competent for the court to determine whether the reasonable time required by law for the presentment has been exceeded or not. And as no excusing circumstances are disclosed, we think a delay of fourteen days in holding the bill is unreasonable. Of course, the plaintiff was not responsible for the delay in the mail, but he ought to make some explanation why he held the bill the length of time he did.

It is suggested that this point of negligence was made when this case was here on a former appeal, *Walsh v. Dart*, 12 Wis. 635, and impliedly overruled. It is true that this point was made upon the brief of counsel, but the case went off on another point, and it did not become necessary to express any opinion upon the question of diligence, and none in fact was expressed.

We think there must be a new trial.

The judgment of the circuit court is reversed, and a new trial awarded.

ACTION BY PAYEE OF BANK CHECK AGAINST DRAWER, what complaint must allege: *Dolph v. Rice*, 86 Am. Dec. 778.

SIGHT DRAFT, DUTY OF HOLDER AS IT REGARDS PRESENTMENT OF: *Strong v. King*, 85 Am. Dec. 336, and see note 342.

TOWLE v. EWING.

[28 WISCONSIN, 286.]

ORDINARY QUITCLAIM DEED EXECUTED BY DEVISEE FOR LIFE, with a power in him to sell the entire interest, conveys only his life estate, and does not amount to an execution of the power of sale.

THE will of Clarke J. Towle, deceased, directed the payment of his funeral expenses and debts out of his personal estate, and then devised and bequeathed all his real and personal estate to his mother, Anna Towle, "to have and to hold during her natural life, with the right to sell and convey the same"; and a provision was added, that "should my brother, Jackson Towle, outlive my said mother, Anna Towle, it is my will that any residue or remainder of my estate, or the avails of any sale of a part or of the whole of my said estate of which my said mother shall be in possession at the time of her death, shall go to my said brother, Jackson Towle, and his heirs," etc. Other facts appearing in the opinion show the nature of the controversy between the parties.

Frisby and Weil, for the appellant.

Thorp and Frisby, for the respondent.

By Court, PAINE, J. It evident from the provisions of the will of Clarke J. Towle that his mother, Anna Towle, took only a life estate in the land devised, with a power to sell the entire interest. Her interest is expressly limited to her own life, and the remainder, in case the land was not sold, or any residue of the proceeds of a sale that might remain at his mother's death, was devised to his brother.

It appears that this brother died before the mother, and that the father, who is the appellant, was the sole heir at law of this brother, and of Clarke J. Towle. It also appears that, before her decease, the mother sold the land by a quitclaim deed to the respondent, for the consideration, as expressed in the deed, of one thousand dollars. The land was afterward sold by the appellant, as administrator, under a license, and the present controversy is between the appellant, claiming the surplus proceeds of the sale after the payment of the debts, as heir at law of Clarke J. Towle or of Jackson Towle, and the respondent, claiming them by virtue of the conveyance from Anna Towle in her lifetime.

The rights of the parties depend, therefore, entirely on the effect of that conveyance. If it can be construed as an exer-

cise of the power of sale given by the will, then it conveyed the entire estate to the respondent, subject only to its being taken by proper proceedings to pay the debts of the testator. And if so taken, the respondent would be entitled to any surplus that might remain. But if that deed is to be regarded, not as an exercise of the power of sale conferred by the will, but only as a conveyance of whatever interest Anna Towle had in the land in her own right, then it merely operates to convey to the respondent her life estate, and on her death, the estate would have vested in the appellant, as heir at law of Clarke J. Towle or of Jackson Towle.

The form of the deed does not appear in the case, any further than by the statement that it was a quitclaim deed; and by that, I understand a quitclaim deed in the ordinary and usual form. Such a deed contains no apt words indicating an intent to sell under the power. On the contrary, its language naturally and properly relates only to the interest which the grantor owned in the land. And where such is the case, the party making the conveyance actually owning an interest upon which it can take effect, it is held to be only a conveyance of that interest, and not an execution of the power.

In Sugden on Powers, chapter 6, section 8, the question, "What amounts to the executions of a power, where the donee has an interest in the estate?" is considered. It is there said: "1. It is well settled that where a man has both a power and an interest, and does an act generally as owner of the land, without reference to his power, the land shall pass by virtue of his ownership. He has an estate grantable in him, and also a power to limit a use; and when he grants the land himself, without any reference to his authority, it implies an intent to grant an estate as owner of the land, and not to limit a use in pursuance of his power."

Some exceptions are afterwards stated, where, when the conveyance could not have the effect clearly intended by the parties except by supposing it to have been executed under the power, it would be so held, although the power was not expressly referred to. But this case cannot fall within these exceptions, for the reason that an ordinary quitclaim deed evinces no intention to pass anything more than the grantor's interest, and it has full effect for that purpose.

The following cases also sustain the conclusion that the quitclaim deed of Anna Towle would pass only her own interest, and would not be held as an execution of the power: *Griswold*

v. *Bigelow*, 6 Conn. 258; *Lockwood v. Sturdevant*, 6 Id. 385-387; *Johnson v. Stanton*, 30 Id. 297; *Mory v. Michael*, 18 Md. 227.

The appellant, as heir at law of either Clarke J. or Jackson Towle, was entitled to the surplus, and the order assigning it to Ewing must be reversed, and the cause remanded for further proceedings.

Ordered accordingly.

QUITCLAIM DEED ONLY PURPORTS TO RELEASE AND QUITCLAIM WHATEVER INTEREST the grantor possesses at the time: *San Francisco v. Louisa*, 79 Am. Dec. 187, and note 192.

QUITCLAIM DEED FROM GRANTEE OF TAX COLLECTOR WILL BE COLOR OF TITLE, and an entry under it will give the grantee possession of the whole tract described in it: *Wells v. Jackson Iron Mfg. Co.*, 90 Am. Dec. 575.

QUITCLAIM DEED FROM MORTGAGEE TO MORTGAGOR of mortgaged premises, effect of: *Waters v. Waters*, 89 Am. Dec. 540.

THE PRINCIPAL CASE IS CITED to the point that a quitclaim deed in the usual and ordinary form passes to the grantee only the interest of the grantor in the lands conveyed, and the grantee is not to be regarded as a *bona fide* purchaser without notice, in *Martin v. Morris*, 62 Wis. 428.

MURPHY v. CITY OF FOND DU LAC.

[28 WISCONSIN, 355.]

IN TRESPASS FOR PLACING DIRT UPON PLAINTIFF'S LOT, HE IS ENTITLED to nominal damages, although the lot was benefited thereby, but he cannot recover as damages what it would cost to remove the dirt. Whether the placing of the dirt on the lot was a benefit to it is for the jury to determine, with reference to the use for which the plaintiff intended the lot, if that be shown.

JURY ARE AT LIBERTY TO APPLY THEIR GENERAL KNOWLEDGE in determining the question whether an increase of frontage is a benefit adding to the value of a lot.

TRESPASS *quare clausum*, in putting dirt upon the plaintiff's lot. The opinion states the case.

N. C. Giffin, for the appellant.

E. S. Bragg, for the respondent.

By Court, PAINE, J. The instruction that although placing the dirt on the plaintiff's lot may have improved its value, she would be entitled "to recover as damages what it would cost to remove the same," was erroneous. The fact that a trespass may have benefited the property invaded cannot con-

stitute a complete defense. The party is always entitled to nominal damages for the vindication and protection of his right. But beyond this, except in cases where exemplary damages may be given, he is confined to his actual damages. And this being so, the incorrectness of this instruction is apparent. It assumes that the jury might be satisfied from the evidence that the placing of the dirt on the lot was really a benefit to it, and increased its value, yet be required to give the plaintiff as damages what it would cost to remove it. Suppose a trespasser fills up a water-lot, which, without being filled, is useless. Could the owner recover the cost of removing the dirt, as damages for the trespass, and at the same time leave it on the lot and enjoy the benefit of it? Suppose the trespasser should grade a lot which was previously inaccessible, and greatly increase its value by the grading. Could the owner take the advantage, and yet recover the cost of replacing the dirt in its former position? These illustrations seem sufficient to show that the rule given to the jury cannot be the proper rule of damages.

Undoubtedly the plaintiff would have been entitled to an instruction that, in determining whether the lot was benefited or not, the jury should consider the uses and purposes to which she intended to devote it. But in the absence of anything to the contrary, it is to be presumed that they were properly instructed on this point, and gave to those circumstances proper consideration. And although after doing so they should come to the conclusion that the act complained of really caused no damage whatever, but, on the contrary, was a benefit to the plaintiff, they were required to give her arbitrarily as damages what it would cost her to remove the dirt.

I think, also, that the evidence as to whether the change made did not give the plaintiff's lot more frontage on the street was improperly excluded. The plaintiff's counsel suggests that the defendant did not offer in this connection to show that such increased frontage was any advantage. But if such was the actual effect upon the lot, the defendant had a right to show the fact. The jury would have had the right to apply their general knowledge to the facts, and to have determined whether an increase of frontage was an advantage or not, without any direct expression of opinion on the part of witnesses, upon the subject.

The judgment is reversed, and the cause remanded for a new trial.

EXEMPLARY DAMAGES, WHEN RECOVERABLE in trespass *quare clausum*: *Perkins v. Towle*, 80 Am. Dec. 149, and note 153; *Best v. Allen*, 81 Id. 338.

LAW PRESUMES DAMAGE FROM TREPASS: *Atwood v. Fricot*, 76 Am. Dec. 567, and note 571.

JURORS SHOULD TEST TRUTH AND WEIGHT OF EVIDENCE, WHEN HEARD, BY THEIR GENERAL KNOWLEDGE derived from experience, observation, and reflection: *Ottawa G. L. Co. v. Graham*, 81 Am. Dec. 263, and note 266.

SCHNEE v. SCHNEE.

[28 WISCONSIN, 377.]

LAND PATENT ISSUED BY PROPER OFFICERS OF UNITED STATES IS PRESUMED to be valid, and is *prima facie* evidence of regularity in all the preliminary steps to entitle the patentee thereto.

PURCHASER FOR VALUABLE CONSIDERATION FROM PATENTEE IN POSSESSION TAKES FREE of all equitable claim as against the patentee's title of which he had no actual notice, although documentary evidence of a mistake in the issue of a patent existed in the files and records of the general land-office, and the record in the proper register's office of the entry certificate was in the name of a party other than the patentee.

EQUITABLE ESTOPPEL—ACT IN FAITH.—The owner of a certificate of sale procured a patent, but by mistake it was made to his father instead of himself. He gave the patent to his father, and afterwards absented himself from the state for ten years, leaving his father in possession of the land, to deal with it as his own. *Held*, that the son was estopped from asserting an equitable title to the land as against a purchaser from the father, in good faith, for a valuable consideration.

ACTION for reformation of mistake in issuing land patent, etc. Entry of the land was made by the plaintiff, Henry Schnee, but through a mistake made at the general land-office, the patent was issued to the defendant, George Schnee, father of the plaintiff. The plaintiff was aware of the mistake at the time he received the patent, and took no steps to correct it, but delivered the patent over to his father, and went to a distant state, leaving his father in possession of the land and the patent. He was absent for ten years and upwards; and in the mean time his father mortgaged the land to one Bailey, and afterward sold the equity of redemption to one Long, who, later on, quitclaimed to Bailey. The father, at the time of the conveyance to Long, first informed Bailey of the mistake in issuing the patent, none of the parties supposing, however, that the plaintiff would ever assert any claims to the land. But soon after the plaintiff's return, he brought this action, making George Schnee, Long, and Bailey parties defendant, and asking the court "to reform the mistake which

had intervened in issuing" the said patent, and to declare void the conveyances to Long and Bailey. The court found and adjudged that the plaintiff was estopped from insisting on any equitable title to the premises, and the plaintiff appealed.

Dunn and Read, and S. U. Pinney, for the appellant.

Paine and Carter, for the respondent.

By Court, DIXON, C. J. Where a patent has been issued by the proper officers of the United States, the presumption is that it is valid, and passes the legal title. It is, furthermore, *prima facie* evidence of itself that all the incipient steps had been regularly taken before the title was perfected by the patent: *Minter v. Crommelin*, 18 How. 87, and cases cited. With this presumption existing in favor of the validity of the patent and of the title of the patentee, and evidence of the regularity of the proceedings upon which it was issued, with the patent recorded in the office of the register of deeds, and the patentee in full and exclusive possession of the land, holding and controlling it as his own, the defendant Bailey, having no notice in fact of the adverse claim of the plaintiff, became purchaser from the patentee for a valuable consideration. The history of his purchase, or the manner in which it came about, is immaterial. The important facts are, that he purchased for value and without knowledge of the claim of the plaintiff. Now, putting the case in the most favorable light possible for the plaintiff, and more favorably, we think, than the evidence will authorize,—namely, that he furnished the money to enter the land, receiving the certificate in his own name and for his own use, and that his father, the patentee, to whom the patent was issued through mistake, had no equitable title or interest,—how stands the claim here presented? In our judgment, the title of the defendant Bailey is obviously superior. Indeed, this is not denied by the learned counsel for the plaintiff, unless Bailey is to be affected with constructive notice of the plaintiff's claim; and this is the real question involved. It is argued, in the first place, that he is chargeable with such notice, and is not within the general rule protecting purchasers in good faith and for a valuable consideration, because the source of his title was a patent issued by the officers, without authority, and documentary evidence of the mistake or want of authority existed on the files and records of the general

land-office at Washington, which were open to inspection. It was said that it was his duty to have examined and ascertained the mistake, and if he neglected to do so, he acted at his peril, and cannot be regarded as a purchaser in good faith. It will be readily perceived that this doctrine directly conflicts with the authorities above cited. A patent being the highest evidence of title from the government, and presumptively valid, the purchaser from the patentee, or those holding under him, is not required to go behind it, and to know that the previous steps to justify the making of it have been regularly taken. The law presumes that they were so taken, and on this presumption the purchaser may safely proceed until he receives notice to the contrary.

The doctrine contended for may be true of different purchasers from the government of the same tract of land, which sometimes happens through mistake or otherwise. The last purchaser in such case may be, and no doubt is, chargeable with knowledge of any facts appearing by the records of the land-office at which he purchases, or of the general land-office, going to show the claim or title of the first purchaser. And the doctrine may, under some circumstances, perhaps, be carried somewhat farther; but it clearly does not apply to a case like this; and the authorities cited by counsel do not sustain his position. Those which may be supposed to bear most directly upon the question are *Arnold v. Grimes*, 2 Iowa, 1, and *Moyer v. McCullough*, 1 Ind. 339. In the former, the grantee of the patentee was an assignee for the benefit of creditors, and it was held that he was not an innocent purchaser. The court say that in point of fact he was a purchaser with notice of all the plaintiff's rights; and in point of law he stood in the same attitude; he was but the patentee himself, for he held but as trustee for the patentee's creditors. And the observation that, as between conflicting entries, the doctrine of notice is discarded, was made with reference to persons claiming the relation of assignees or judgment creditors of the patentee, who take no better title than the patentee himself has. And in the latter case, the point decided was, that if a patent be issued by mistake, or without authority, the party having the previous equitable title may, by bill in chancery, obtain from the patentee, or his voluntary grantee, the legal title.

In the second place, it is contended that Bailey was chargeable with notice, because the duplicate certificate issued to the plaintiff was of record in the office of the register of deeds. It

does not clearly appear from the printed case that the certificate was so recorded, and we can find no statute which authorized the register to receive and record it. But assuming that it was recorded, and the recording authorized, so that Bailey was bound to take notice of it, and to know that the entry was made by the plaintiff, Henry Schnee, while the patent was issued to the defendant George Schnee, still that was no evidence or notice that the patent was wrongfully issued or made without authority. It was no evidence, for the reason that the certificate was by law assignable, and that being assigned, the patent would be made to and in the name of the assignee: *Brightly's Dig.*, p. 498, sec. 222; *Lester's Land Laws*, 351. The patent having been issued to George Schnee, the presumption was that it was lawfully issued, and that the certificate had been assigned to him, which assignment was not required to be, and indeed could not have been, recorded in the office of the register of deeds.

But there are still other grounds upon which the claim of the plaintiff must be defeated. The land was entered in 1849, and the patent issued in 1850. The plaintiff received the patent from the office, and delivered it to his father. He was fully aware of the mistake at that time, and took no steps to rectify it, but went to California in the year 1852, leaving his father, as he had always theretofore been, in possession of the land and of the patent. He remained in California ten years and upwards, making no claim to the land, but allowing his father to hold and deal with it as his own. He returned from California in 1862, long after Bailey had acquired his interest, and subsequently instituted this action. Under these circumstances, we have no hesitancy in saying that he is estopped from setting up any equitable title to the land as against a purchaser for value from his father without notice of his claim.

Judgment affirmed.

UNITED STATES PATENT IS NO HIGHER EVIDENCE OF TITLE than a prior legislative grant: *Meyerle v. Aale*, 87 Am. Dec. 76, and see cases in note 80; *Dixon v. Caldwell*, 86 Id. 487, and note 491.

TITLE AND RIGHTS OF PURCHASER OF PUBLIC LANDS: *Brill v. Stites*, 85 Am. Dec. 364, and note 367.

CONCLUSIVENESS OF DECISIONS OF LAND-OFFICERS: *State v. Bachelder*, 80 Am. Dec. 410, and note 422; *Brill v. Stites*, 85 Id. 264.

ESTOPPEL IN FAIR: *Davis v. Davis*, 85 Am. Dec. 157; *Maple v. Kinsert*, 82 Id. 214.

WALROD v. MANSON.

[28 WISCONSIN, 392.]

PERIOD OF LIMITATION TO ACTION UPON PROMISSORY NOTE IF NOT EXTENDED by giving with the note a warrant of attorney under seal, and such warrant confers no authority to enter judgment upon the note after the latter is barred. And a judgment so entered should be set aside, although the plaintiff does not show merits.

ACTION on a note. Attached to the note was a warrant of attorney under seal, executed by the defendants February 12, 1856, payable September 1, 1858. In April, 1867, judgment was entered in the court below for the amount due on the note at that date. The defendant Manson moved that the judgment as to him be set aside, upon the grounds set out in the opinion, which motion was allowed, and the plaintiff appealed.

W. C. Silverthorn and A. B. Braley, for the appellant.

S. U. Pinney, for the respondent.

By Court, **PAINE, J.** The position of the appellant's counsel, that a warrant of attorney under seal, given with a promissory note, makes the period of limitation to an action upon the latter the same as that upon sealed instruments, cannot be sustained. It is well settled that a mortgage given with a note does not extend the statute of limitations as to the note; and the same argument is applicable to both cases. It is certainly quite as strong in the case of the mortgage as of the warrant of attorney.

This being so, the question is whether, after the note is barred by the statute, a judgment can properly be entered upon it under the authority conferred by the warrant. I do not think it can be; and in coming to this conclusion I adopt the reasoning of the appellant's counsel, in contending that the note itself was not barred. Starting with the proposition that the warrant, being under seal, would not be barred before twenty years, he says: "Now, what is the warrant good for without the note? Nothing. It is worthless. If the one is dead the other is also, because they are not independent instruments. Anything which avoids the note must necessarily destroy the warrant. If the statute bars the one, it must, of course, extinguish the other," etc. It is evident, therefore, according to this reasoning, that, if we reject the counsel's conclusion that the note itself was not barred, that disposes of the other question, and, to use his language, by "barring the note," "extinguishes" the warrant.

I think there is a fallacy in the question put by counsel: "How long is it before the warrant itself becomes barred by the statute?" This assumes that the warrant itself constitutes a cause of action, which is not the case. It is a mere authority given for the purpose of furnishing a remedy upon the cause of action created by the note. It relates wholly to the remedy on the note, and of necessity, when that remedy is barred, the authority of the warrant falls with it. It is incapable, from its very nature, of any enforcement as a separate instrument, in which respect it differs from a mortgage. The latter instrument has a distinct office and function to perform. It creates a lien upon the property mortgaged, and an equitable right of action for a foreclosure. And the courts of equity have held that this may be enforced after the note given with the mortgage is barred by the statute. But that is because the mortgage does not relate wholly to the legal remedy upon the note, like a warrant of attorney, but itself creates a distinct right capable of enforcement: See Angell on Limitations, secs. 73, 91; *Clarke v. Figes*, 2 Stark. 234; S. C., 3 Eng. Com. L. 391.

It is not reasonable to suppose that the party executing a warrant of attorney with a note intends to confer any authority by it beyond the life of the note. After that time no legal remedy can be had upon it, unless the maker waives the benefit of the statute. And the warrant does not purport to give authority to waive that benefit for him. It can be fairly construed only as an incident to the legal remedy upon the note during its life, and when that remedy is destroyed the incident perishes also. If after that the holder of the note desires to try the experiment whether the maker will waive the benefit of the statute, he should bring a suit so as to give him an opportunity.

I think, therefore, the judgment was improvidently entered, and that the court was right in setting it aside. It was entered without authority, as appeared on the face of the record. To say that in such case the party applying must show merits, would be to deny him the benefit of the statute altogether. He may have no other defense. And yet, if judgment may be entered against him under the authority of a stale and extinguished warrant, to which he has no opportunity to answer, he would be cut off entirely from the benefit of the statute.

The objection here is a total want of authority to enter the judgment. If it properly comes under the head of irregularity,

it is too late to take in this court the objection that the irregularity complained of was not specified in the motion. Had it been taken in the court below, it could, if necessary, have been obviated. But as the motion was submitted and heard upon its merits there, it must be so here.

The order is affirmed, with costs.

WHERE JUDGMENT IS CONFERRED BY FRAUDULENT GRANTOR BEFORE CLAIM IS BARRED BY STATUTE OF LIMITATIONS, the original cause of action is merged in the judgment, and the plea of the statute cannot avail against it: *Schaferman v. O'Brien*, 92 Am. Dec. 708.

ANTEDATED NOTE, WHEN STATUTE OF LIMITATIONS BEGINS TO RUN AGAINST: *Paul v. Smith*, 90 Am. Dec. 647.

WHEN STATUTE OF LIMITATIONS BARS RECOVERY ON NOTE, the right to foreclose a mortgage given to secure the note is also barred: *Harris v. Mills*, 81 Am. Dec. 259; *McCarthy v. White*, 82 Id. 754.

THE PRINCIPAL CASE IS CITED to the point stated in the syllabus in *Brown v. Parker*, 28 Wis. 29.

MARTIN v. WESTERN UNION RAILROAD COMPANY.

[28 WISCONSIN, 437.]

ERROR IN REFUSING NONSUIT IS CURED, where the defect in the evidence is afterwards supplied.

PROOF OF ONE ONLY OF TWO GROUNDS OF LIABILITY FOR NEGLIGENCE is sufficient to authorize a recovery, where both are alleged.

RAILROAD COMPANY IS LIABLE FOR INJURY BY FIRE, caused either by negligence in running a railroad train through a city at an unlawful speed, or in opening grates and flues of the engine in a careless manner, and thereby allowing lighted cinders to be thrown upon the plaintiff's premises.

IT IS NOT EVIDENCE OF SUCH CONTRIBUTORY NEGLIGENCE AS WOULD PREVENT RECOVERY, that part of a pane of glass was out of a window of the plaintiff's house, adjoining the defendant's road, and that the damage was caused by sparks blown through the window from the defendant's engine, which was being drawn at unlawful speed.

ACTION to recover damages for the loss of goods by fire, through the alleged negligence of the defendant. The substance of the complaint and the material facts appear in the opinion. The verdict and judgment were for the plaintiff, and the defendant appealed.

Feller and Dyer, for the appellant.

C. N. Parsons, for the respondent.

By Court, **DIXON, C. J.** Where the evidence for want of which a motion for a nonsuit ought to have been granted is

afterward supplied, the error in refusing to allow the motion is cured. The judgment will not be reversed nor a new trial granted, merely because the evidence was not before the court when the nonsuit was asked: *Barton v. Kane*, 17 Wis. 37 [84 Am. Dec. 728]; *Dodge v. McDonnell*, 14 Id. 553. The rule applies here, and is decisive of all the grounds taken in support of the motion for nonsuit, except the last. Evidence was subsequently given that the place where the train was running, and where the fire occurred, was, as averred in the complaint, within the limits of the city of Beloit.

The last ground for the motion involves the same question subsequently presented by the instruction asked by the defendant, and which was refused, and may best be considered in connection with that instruction. The complaint, in substance, alleges the negligence of the defendant in causing the fire to have consisted in running the train at an unlawful and unusual rate of speed within the city limits, and in opening the grates and flues under and around the engine-boiler in a reckless, negligent, and careless manner, thereby allowing fire, coal, sparks, and cinders to be thrown in and about the premises occupied by the plaintiff. Of the latter allegation no proof was given; and the question is, whether the plaintiff can recover upon proof of negligence in the former particular only. Counsel for the defendant, while apparently conceding that the running of the train at an unlawful rate of speed within the city limits would be sufficient to charge the company with the loss, if that alone had been alleged, yet, as the other acts of negligence are also averred, insist that they too must be proved before there can be any recovery on the part of the plaintiff. We have no doubt that the danger to buildings and other adjacent property liable to injury and destruction by fire, caused by the emission of coals and sparks from the engine when in rapid motion, was one of the mischiefs which the statute limiting the rate of speed through cities and villages was designed to prevent, and are consequently of opinion that for losses so occasioned by trains moving at a greater rate of speed than the statute prescribes, the company is responsible. With this view of the law, which is not seriously contested, it would not seem material to the plaintiff's right of action in this case that the other acts of negligence set out in the complaint were not proved. It is not, as argued by counsel, the averment of one kind of negligence in the complaint and proof of another at the trial, but the averment of negligence in two different re-

spects, either of which is sufficient to authorize a recovery, and proof upon trial in one respect only. The latter we suppose to be admissible within all the rules of pleading and evidence.

The next question arises upon the motion for a new trial, and is as to whether there was any evidence upon which the jury were authorized in finding that the train was running at a rate exceeding six miles an hour. The testimony upon this point is conflicting. The plaintiff testifies that the train was running very fast; that she never saw a freight train run so fast through the city before nor since; and that she should think it was running at least eight miles per hour. Mary Wilkinson, another witness on the part of the plaintiff, testifies that she saw the train running very fast, and throwing a good deal of fire, and that the cars were running faster than usual, which drew her attention to the train. Two witnesses on the part of the defendant, the engineer and baggage-man on board the train, testify that it was not running to exceed five miles per hour. Here, certainly, was not an entire want of evidence to support the verdict. The question was not one to be settled with the greatest certainty by the testimony of witnesses; and whether the jury should believe the plaintiff and her witness or the witnesses of the defendant, was a question for the jury to determine. There may have been circumstances attending the examination of the engineer and baggage-man which led the jury to discredit them. Other facts may have had their influence, especially the strongly corroborative one as to the length of time occupied in running the train to the next station, a distance of over nine miles, in twenty-five minutes. Allowing twelve minutes for the running of the first mile, at the rate of five miles per hour, according to the highest rate of speed fixed by the engineer and baggage-man, and the other eight miles and upward must have been run at the rate of nearly forty miles per hour, with a train consisting of seventeen freight cars and a caboose. With this fact before them, by the testimony of the engineer himself, the jury may very reasonably have believed that both he and the baggage-man were mistaken in their estimate of the time occupied in running the first mile, and that the rate exceeded six miles per hour; and if the jury did so believe, who shall say that they were in error? Certainly we cannot; and still more certainly are we unable to say that the verdict is wholly unsupported by evidence, as we must do before the judgment can be reversed upon this ground.

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The burning of the ship happened for most people, and when it is customary to keep the windows open, to require them to be open. Suppose, in such a case, the windows had been entered in that way, and the sparks had been used for improper use of the fire. Are the occupants such a careless or negligent? Are the occupants required to exercise so much care in this nature of the matter? Must, contrary to the speed that they were exercising from trains passing windows close to them, have them opened? And comfortable to both these questions must be answered, then, the question here is, if they are, then, the answer. If it would give a negative answer, to have had the windows in the plaintiff's case, that a small part of the clearly was not had neglected to have done, and that the judgment must be given to the plaintiff.

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LIABILITY FOR FIRE

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BE GRANTED: *Phillips v. B.*
Parker, 80 Id. 172, and cases
OF SPAN

CAUSED BY COALS OF SPAIN
Railroad Co., 93 Am. D.
Id. 166; Ryan and not

CAUSED
v. *Railroad Co.*, 91 Id. 166; *Hyatt*
v. *Doak*, 91 Id. 504, and note
Shanefelt, 96
RIGHT OF ACTION: See *W.*
Steamboat Co.

5; *Simmons v. Steamboat Co.*

point stated in the syllabus
Cited to the third point stated

The only remaining question is as to the alleged negligence of the plaintiff in permitting about one fourth of a pane of glass to be out of the window of her house, through which the sparks are supposed to have passed and set fire to the clothing upon the inside. It does not appear when the glass was broken, or that the plaintiff knew it before the time of the fire. But suppose it had been broken for a long time, and the plaintiff knew it, it is but an exceedingly slight circumstance upon which to base the charge of negligence against her so as to prevent a recovery. The burning happened at a warm season of the year, when it is customary for most people, and convenience and comfort require them, to keep the windows of their houses wholly or partially open. Suppose, in such case, that the plaintiff's window had, according to the general custom, been open, and the sparks had entered in that way, would it have been such a careless or improper use of her house as would have defeated the action? Are the occupants of adjacent dwellings required to exercise so much care to prevent accidents of this nature happening from trains passing at an unlawful rate of speed that they must, contrary to common usage, keep the windows closed when it would otherwise be most convenient and comfortable to have them opened? It seems clear to us that both these questions must be answered in the negative; and if they are, then the question here presented must also receive a negative answer. If it would not have been negligence in the plaintiff to have had the window open at the time, it clearly was not that a small part of a pane of glass was gone, and that she had neglected to have it replaced.

It follows from these views that the judgment must be affirmed.

Judgment affirmed.

WHEN NONSUIT SHOULD OR SHOULD NOT BE GRANTED: *Phillips v. Brigham*, 71 Am. Dec. 227, and note 229; *Page v. Parker*, 80 Id. 172, and cases in note 183.

RAILROAD COMPANY, LIABILITY FOR FIRES CAUSED BY COALS OR SPARKS FROM ENGINES: See *Frankford etc. Turnp. Co. v. Railroad Co.*, 98 Am. Dec. 708, and note 713; *Lackawanna etc. R. R. Co. v. Doak*, 91 Id. 166; *Byan v. Railroad Co.*, 91 Id. 49; *Ohio etc. R. R. Co. v. Shanefelt*, 95 Id. 504, and note.

WHEN CONTRIBUTORY NEGLIGENCE DEFEATS RIGHT OF ACTION: See *Wilmot v. Howard*, 94 Am. Dec. 338, and note 345; *Simmons v. Steamboat Co.*, 93 Id. 99, and note 106.

THE PRINCIPAL CASE IS CITED to the first point stated in the syllabus in *McPherson v. Rockwell*, 37 Wis. 162; and is cited to the third point stated in

the syllabus in *Kellogg v. Chicago etc. R. R. Co.*, 27 Id. 235; *Ewen v. Chicago etc. R. R. Co.*, 38 Id. 635; *Haas v. Chicago etc. R. R. Co.*, 41 Id. 50; *Murphy v. Chicago etc. R. R. Co.*, 45 Id. 237. It is distinguished in *Brusberg v. Milwaukee etc. R. R. Co.*, 50 Id. 234.

JOHNSON v. COLEMAN.

[23 WISCONSIN, 452.]

EQUITY WILL ANNUL, AT SUIT OF WIDOW, JUDGMENT OF DIVORCE obtained by her husband, in his lifetime, on the ground of desertion, where it appears that the separation was voluntary, under written articles, and that the husband, by false representations, obtained service of process in the divorce suit by publication, when personal service could have been had. Nor will such relief be denied because the divorce judgment was thus void for want of jurisdiction; and in such a suit, both the administrator and the heirs are proper parties, where the husband left real and personal property.

SUIT for equitable relief against a judgment for divorce. The opinion states the case.

E. S. Bragg, for the appellants.

H. F. Ross, for the respondent.

By Court, COLE, J. This action is brought by a widow against the personal representatives of her deceased husband and the heir at law, to have a judgment of divorce adjudged and declared to be void and of no effect.

If the matters stated in the complaint are true,—and upon this demurrer we must assume they are,—then it is evident a gross fraud was practiced upon the court in obtaining the divorce. The ground of the divorce was stated to be desertion on the part of the plaintiff, continued for more than one year; whereas, it is alleged that the separation was voluntary, under written articles entered into by the husband and wife. Further, it appears from the complaint that the husband commenced the divorce suit, and obtained an order of publication, upon the ground that he was unable to ascertain the residence of the defendant in that action, when he well knew where she was residing; that no copy of the summons and complaint was served upon her personally, nor by depositing the same in the post-office, directed to her; and that the plaintiff had no knowledge of that suit until after a lapse of more than two years from the time judgment for a divorce was entered. All these allegations show that the process of the court was

used for the purpose of effecting a fraud upon the rights of the plaintiff, and to deprive her of all opportunity to contest the justice and merits of that proceeding. And now, one objection taken to this complaint is, that the joinder of the administrators of the deceased husband with the heir at law is improper. It appears that the husband, at the time of his death, was seised and possessed in fee of real estate in the city of Fond du Lac, of the value of twenty thousand dollars, and was also the owner of considerable personal property. If the judgment of divorce is permitted to stand, there might a question arise, whether the plaintiff would be entitled to dower in this real estate, and to such a portion of the personal property as the law would otherwise allow her. The administrators have a right to the possession of all the real as well as personal estate of the deceased, until the estate shall have been settled, or until delivered over by order of the county court to the heir: R. S., c. 100, sec. 7. They are, therefore, directly interested in the question whether the plaintiff is to have dower in the real estate, and receive any portion of the personalty, and would seem to be proper parties to this suit, which necessarily, in its consequences, involves that question. The interest of the heir, also, in the same question, is quite as obvious and direct. It is said that the complaint seeks no relief against the heir. True, the complaint merely asks that the judgment of divorce may be declared void. But if that judgment should be declared void and of no effect, it would open the door for the widow to come in and claim her share of the estate, and thus the heir would be deprived of a portion of the inheritance. The pecuniary interest of the heir, therefore, is opposed to the application, and to granting the relief asked in the complaint. Indeed, it is doubtful whether the court would take jurisdiction and annul the judgment of divorce, the husband being dead, unless it appeared that he left property in which the plaintiff might possibly have some rights. The heir has, then, a common interest with the administrators in defeating the plaintiff, and, we think, was properly joined in the suit.

A further objection taken to the complaint is, that it does not set out any *prima facie* valid decree, but sets forth a record which shows that the court had no jurisdiction to enter the judgment of divorce. It seems to us that this objection is not valid. It is true, if the court never acquired jurisdiction of the defendant in the divorce suit, she would not be bound by

that judgment. But it is not a fair construction of the allegations of the complaint to say that they show that the judgment was void upon its face. The want of jurisdiction rather appears from extrinsic facts *dehors* the record. And that judgment may be a serious impediment to the plaintiff in obtaining her dower in her husband's estate. The time for appealing from the judgment of divorce elapsed before the plaintiff became aware of its existence. Her remedy by appeal was therefore gone. It is possible the judgment would have been set aside upon motion on the ground of a want of jurisdiction: *Ætna Life Ins. Co. v. McCormick*, 20 Wis. 265; *Weatherbee v. Weatherbee*, 20 Id. 499. But we can see no substantial objection to the practice of instituting a suit in equity for that purpose. It seems quite as suitable a method to review the questions involved, and to adjudicate upon the rights of the parties, as would be afforded by a motion. Mr. Justice Story says that there is no doubt of the jurisdiction of courts of equity to grant relief against a former decree, where the same has been obtained by fraud and imposition; and that this must be done by an original bill in the nature of a bill of review: Story's Eq. Pl., sec. 426; see *Parish v. Marvin*, 15 Wis. 247.

The demurer to the complaint was properly overruled.
Order affirmed.

EQUITY WILL ENJOIN ENFORCEMENT OF JUDGMENT OBTAINED BY FRAUD, ETC.: *Hibbard v. Eastman*, 93 Am. Dec. 467, and note 473.

PROCEEDINGS TO ANNUL JUDGMENT OF DIVORCE: See *Greene v. Greene*, 61 Am. Dec. 454, and extended note 459.

THE PRINCIPAL CASE IS CITED IN *Everett v. Everett*, 60 Wis. 202, as authority in sustaining the county court in setting aside a judgment of divorce, for the reason that it had been obtained by fraud and imposition.

BANCROFT v. GROVER.

[28 WISCONSIN, 402.]

AWARD OF ARBITRATORS WILL NOT BE VACATED ON GROUND of a mistake, alleged by the party moving to vacate to have been made by him in his testimony on the hearing, in respect to a matter to which his attention was distinctly called.

AWARD BY ARBITRATORS IN GENERAL TERMS THAT INCLUDE all matters submitted, without specific mention of any particular matter or all matters as passed upon, is sufficient, and is to be construed as including all the matters submitted.

In this case, it appears by the evidence given before the arbitrators that there was a note given by McIndoe to Bancroft which was for a claim due the firm from McIndoe. And Bancroft claimed that it belonged to both parties, while Grover claimed the right to charge it to Bancroft, on the ground that the latter had appropriated so much of the firm property. There was no other note given by McIndoe, so far as appears. And upon proof of this state of facts, the language of the award applies at once to that note, the subject-matter is identified, and there is no uncertainty whatever. Awards should be fairly and liberally construed, with a view to give effect to them, and accomplish the ends of justice and the intentions of the parties: *Hanson v. Webber*, 40 Me. 194; *Rogers v. Tatum*, 25 N. J. L. 281; *Garitee v. Carter*, 16 Md. 309. Construing this award in accordance with this rule, it is not liable to either of the objections urged.

The order appealed from is affirmed, with costs.

MISTAKE AS GROUND FOR SETTING ASIDE AWARD: See *Railroad Co. v. Moore*, 73 Am. Dec. 778.

POWER OF ATTORNEY TO BIND CLIENT BY SUBMISSION OF CASE TO ARBITRATION: See *Railroad Co. v. Stephens*, 88 Am. Dec. 138.

GIVING OF NOTICE OF AWARD ON SUNDAY IS VALID: *Kiger v. Coats*, 81 Am. Dec. 351.

ADMINISTRATOR MAY SUBMIT CLAIMS AGAINST ESTATE TO ARBITRATION: *Crum v. Moore*, 82 Am. Dec. 262.

AWARD WILL BE RELIEVED AGAINST IN EQUITY for mistake of law by arbitrators, whereby they allowed a greater sum than should have been awarded: *Davis v. Cilley*, 84 Am. Dec. 85.

THE PRINCIPAL CASE IS CITED to the third point stated in the *syllabus* in *Begg v. Begg*, 56 Wis. 538; and to the fourth point of the *syllabus*, in *Call v. Ballard*, 65 Id. 190. In *Brace v. Stacy*, 56 Id. 154, the court say: "We are not convinced that there is any such defect in the award, after the modifications made by the learned circuit judge, as would justify the vacation of the same," citing the principal case.

DEAN v. SMITH.

[28 WISCONSIN, 423.]

WRIT OF HABEAS CORPUS IS IN NATURE OF EQUITABLE BAIL, and an arrest and restraint of liberty upon such writ is not "imprisonment for debt," within the meaning of a constitutional prohibition on that subject.

WRIT OF HABEAS CORPUS IS PROPERLY ISSUED in an action to compel a partnership accounting, where the complaint and affidavits show that the defendant had sold all his property in the state, and converted it into money or choses in action, and is threatening to leave the state.

ORDER OF COURT PRIOR TO THAT APPEALED FROM, AND ADJUDICATING SAME MATTER, will not be considered in the appellate court, unless the evidence of it appears in the record on appeal.

ACTION for an accounting, etc., between partners, in which a writ of *ne exeat* was issued against the defendant. From an order refusing to vacate the writ, the defendant appealed.

H. W. and D. K. Tenney, for the appellant.

Stevens and Flower, for the respondent.

By Court, COLE, J. This is an appeal from an order of the circuit court refusing to vacate and discharge a writ of *ne exeat*, and also refusing to have the bond given by the defendant thereupon given up and canceled. The writ of *ne exeat* was issued upon an order of the circuit judge made at chambers. The defendant was arrested upon it, and held to bail. He afterward moved the circuit court, as above stated, to have the writ vacated.

It is said, in the brief of counsel for the respondent, that the order appealed from was correct, because the subject-matter of that order had been previously adjudicated in the case, and that no appeal has been taken from such previous order. But what evidence have we in the record of any such previous adjudication? The record shows that the motion to vacate was heard upon the complaint, affidavits, order, and writ of *ne exeat*, and the answer of the defendant. Perhaps if the respondent had shown, upon the hearing of this motion to discharge the writ, that a previous motion had been made for the same purpose, the question would then be considered *res adjudicata*. But as the case now stands, we have no proper evidence of any such previous adjudication, and we must therefore consider the order upon its merits.

This action was brought to obtain a settlement of certain partnership matters stated in the complaint, for a general accounting by the defendant, for the appointment of a receiver of the partnership property, and for an injunction restraining the defendant from interfering with or removing said property. It is claimed in the complaint that, after payment of the partnership debts, the defendant will have in his hands a large sum of money justly due and belonging to the plaintiff. Now, it is claimed, in opposition to the order appealed from, that the action is simply one to ascertain and collect a debt, or the excess of partnership moneys in the hands of the defendant. A partnership, it is said, is nothing but a contract, and the obli-

gations of the partners to each other on account of dealings in the scope of the business necessarily arise out of contract, and a writ of *ne exeat* in such a case is nothing more nor less than imprisonment for debt, which is prohibited by the constitution of this state. The constitution certainly declares that "no person shall be imprisoned for debt arising out of or founded on a contract, express or implied": Art. 1, sec. 16. But we think a writ of *ne exeat* is not imprisonment for debt, within the intent and spirit of this provision of the constitution. It is said by the authorities to be in the nature of equitable bail, and issued only by the special order of the court, when the party against whom it is asked is about to leave the jurisdiction of the court, so that the decree of the court will be ineffectual: *Neville v. Neville*, 22 How. Pr. 500; *Brown v. Haff*, 5 Paige, 235 [28 Am. Dec. 425]; *Fuller v. Emerick*, 2 Sand. 626; *Johnston v. Johnston*, 25 How. Pr. 181. And this, as it appears to us, is the true nature and character of the writ of *ne exeat*. It prevents a person from going out of the state until he shall give security for his appearance, and is not imprisonment for debt, within the proper meaning and sense of those words.

There has been some conflict of opinion in New York, as will be seen by the above cases, whether the writ of *ne exeat* was not abolished by the code. But no question of the kind can arise in this state under the plain provisions of our statute: See sec. 4, c. 116, and secs. 10, 11, c. 129. And unless the writ is prohibited by that clause of our state constitution which forbids imprisonment for debt arising upon contract, the circuit courts have the power of requiring this kind of bail in cases which are of equitable cognizance, where the defendant is about to elude the justice of the court by removing beyond its jurisdiction. We have already stated that we did not think the constitution abolished the writ.

That the complaint and affidavits presented a proper case for granting the writ seems to us plain. It appears that the defendant had sold and conveyed all of his property in this state, and converted the same into money or choses in action, and was threatening to leave the state, and remove to some of the western states or territories. He was going to depart beyond the jurisdiction of the court, and render it impossible for the plaintiff to have an accounting and settlement of the partnership transactions in this action.

The order of the circuit court, refusing to vacate and discharge the writ, is affirmed.

WRIT *NE EXEAT* granted on oath of complainant alone: *McGee v. McGee*, 52 Am. Dec. 407; that the defendant is going out of the state, or that he had said so, must be charged positively by the complainant: *Id.*

NE EXEAT, when writ of, will be discharged: *McNamara v. Dwyer*, 32 Am. Dec. 627.

THE PRINCIPAL CASE IS CITED to the first and second points stated in the syllabus, in *Is vs Milburn*, 50 Wis. 32.

BONESTEEL v. ORVIS.

[28 WISCONSIN, 506.]

ORDER SETTING ASIDE LEVY UPON EXECUTION IS PROPERLY GRANTED, ON GROUND that the execution was not subscribed by the party issuing it, or his attorney, as required by the statute, this objection being distinctly specified in the affidavit, a copy of which was served, with a notice of the motion. And the fact that the execution was properly subscribed after levy made and notice of motion served, constitutes no ground for denying the motion.

PARTY IS NOT PERMITTED TO DIVIDE UP HIS OBJECTIONS OR CLAIMS FOR RELIEF by several motions, where complete relief can be granted upon one; and all known objections or claims for relief against the same irregularities, not urged by the first motion, are waived.

THE opinion states the case.

E. S. Bragg, for the appellants.

Blair and Coleman, for the respondents.

By Court, DIXON, C. J. Separate appeals from two orders of the circuit court for Fond du Lac County in the same case, affirming previous orders of the judge at chambers, the one setting aside the levy on an execution issued in the action, and the other staying all proceedings on the same execution until an appeal to this court from the judgment in the action should be determined. Both orders at chambers were made on the same day, but the application to set aside the levy was first in order of time, by the service of the motion papers upon the counsel opposed.

First Order. — This order, setting aside the levy, was properly granted, because the execution issued was not subscribed by the party issuing it, nor his attorney, as required by the statute: R. S., c. 134, sec. 8. This ground of irregularity was distinctly specified in the affidavit accompanying the motion as the basis of it, and a copy of the affidavit was served with the notice of the motion. This was a substantial compliance with rule 22, circuit court rules of 1857. The subscribing of

the execution by the attorneys for the plaintiffs after the notice of motion was served, and before the motion was heard, did not cure the defect. Such subscription of process in the hands of the officer, admitting it to have been authorized, could operate only prospectively. It had no retroactive effect. To have given it this effect, an order of court directing the amendment was necessary. The plaintiffs applied for no such order, and the levy was still irregular. The question differs from that presented in *Clute v. Clute*, 4 Denio, 411, where it was held that, on filing the judgment record, the *fi. fa.* thenceforth became regular.

Nor were the defendants estopped from questioning the irregularity of the execution, because "they voluntarily turned out the property levied upon to the sheriff, without demand, for the purpose of having him levy on it, and he did so, as they desired." It does not appear that the defendants were aware of the irregularity at the time they did so. To constitute a waiver of the irregularity on this ground, it should be shown that the defendants knew it at the time they turned out the property.

Second Order.—This order rests on the same grounds of irregularity specified for the first order, and on the additional ground that all proceedings upon the judgment were stayed by an undertaking given on appeal by the defendants to this court. The undertaking was insufficient for that purpose, as has been already decided by this court: *Bonesteel v. Orvis*, 20 Wis. 646. As to the irregularities set up, the defendants were not entitled to bring them forward again as the foundation of a motion to obtain further or different relief against the same execution. A party cannot divide up his objections or claims for relief by several motions, thus doubling or trebling the costs, where complete relief can be granted upon one motion. All known objections or claims for relief against the same irregularities, not urged upon the first motion, are waived: *Pierce v. Kneeland*, 9 Wis. 80, and cases cited.

The first order is affirmed, and the second reversed.

COURT HAVING JURISDICTION TO DETERMINE MOTION TO SET ASIDE EXECUTION, its decision is conclusive, and cannot be re-examined in a collateral proceeding: *Loomis v. Lane*, 72 Am. Dec. 625; setting aside a levy is a judicial act: *Hughes v. Streeter*, 76 Id. 777.

EXECUTION MAY BE AMENDED IN MATTERS OF FORM, and as to clerical errors and omissions, but not as to matters of substance: *Blanks v. Rector*, 88 Am. Dec. 780; and see *Durham v. Heaton*, 81 Id. 275; *McCormick v. Wheeler*, 85 Id. 388.

PURCHASER'S TITLE UNDER EXECUTION MERELY ERRONEOUS WILL BE PROTECTED: *Correll v. State Bank*, 86 Am. Dec. 793, and cases collected in note 797.

THE PRINCIPAL CASE IS CITED to the point that if it were permissible in any case to amend the record in voluntary assignment proceedings by allowing the surety to supply the defect in the affidavit by a supplemental affidavit, it could not be done so as to affect the rights of parties which had attached before the supplemental affidavit was made, in *Auley v. Osterman*, 65 Wis. 128.

FREDENDALL v. TAYLOR.

[28 WISCONSIN, 583.]

MEMBERS OF COMMITTEE OF VOLUNTARY ASSOCIATION ARE INDIVIDUALLY LIABLE on a contract made by a subcommittee of their number, under authority delegated by the whole committee, with one who contracted on the credit of the committee personally, and not of the association, although, in making the contract, the subcommittee assumed to act as officers of the association.

ACTION by Fredendall against Taylor, Kreiss, Leitch, and Spencer to recover pay for making a tank for the use of the State Firemen's Association. The complaint alleged that the plaintiff agreed with the defendants to make the tank for five hundred dollars, to be paid by them; that he did make it, and that the defendants accepted it, and promised to pay him therefor. Leitch was not served with process, Spencer made no defense, and the other defendants answered by a general denial. The State Firemen's Association was an unincorporated body, of which Leitch was president, Taylor vice-president, Kreiss treasurer, and Spencer secretary; and the association duly appointed these officers a committee to make necessary arrangements for an annual tournament. The defendant Spencer testified, in substance; that the committee left it with Leitch and himself to make the arrangements; that they two determined that such tank was necessary; that Spencer advertised for proposals; that the plaintiff's proposal to make the tank for five hundred dollars was accepted; and that it was built accordingly, and used by the association at the tournament. He further testified that, at the time of the contract, he told the plaintiff that the defendants were a committee to make arrangements for the tournament, and that Leitch, Taylor, and Kreiss were responsible, but that he did not promise on their behalf as individuals to pay the plaintiff for the tank. The plaintiff testified that, in making the contract

and performing the work, he gave credit to the defendants, but that neither Kreiss nor Taylor had individually promised to pay him; and the two latter testified that they did not know until the work was done that Spencer and Leitch had made any contract for the same, and that the committee did not authorize them to make such contract. The jury were instructed that the evidence did not warrant a verdict against Taylor and Kreiss, and they found accordingly. The plaintiff appealed.

Isaac Rogers, for the appellant.

E. S. Bragg, for the respondents.

By Court, PAINE, J. The only question presented on this appeal is, whether the case made against the defendants Taylor and Kreiss was such as to justify the direction given to the jury to find a verdict in their favor. I do not think it was. They were both members of the committee appointed by the State Firemen's Association to make the necessary arrangements for holding the annual tournament. It is true, they did not act personally in contracting with the plaintiff, the committee having delegated its authority to a subcommittee composed of Spencer and Leitch. But the latter, in making the contract, were acting as agents of the committee, so that the liability of the whole committee is the same as though all had acted in making the contract. It was not claimed that the contract was not within the scope of the committee's authority, or of that delegated to the subcommittee. On the contrary, it is conceded that the well was necessary to the tournament, and it was used for that purpose. It is conceded that the State Firemen's Association was not incorporated at this time, and had no legal existence, so that it could contract or be used as such. And where such is the case, a committee which assumes to contract for services for such an irresponsible, intangible association, must become personally liable, else there is no liability whatever. One professing to act as agent, if he does not bind his principal, binds himself: *Dennison v. Austin*, 15 Wis. 834. And it can make no difference that the reason why he does not bind his principal is because the principal for whom he professed to act has no existence.

It is not to be presumed in this case that the plaintiff contracted upon the credit of the association. And there is proof tending to show that, although he fully understood that the committee was acting for the association, yet he relied on the

personal liability of the committee, including Taylor and Kreiss.

The case is not distinguishable in principle from that of *McCartee v. Chambers*, 6 Wend. 649 [22 Am. Dec. 556], where the committee, acting by an agent, as in this case, were all held personally liable. Such a rule is salutary, and tends to the promotion of justice, by preventing the procurement of services from too incautious and confiding laborers, by putting forward an irresponsible committee to act for an irresponsible public gathering.

The judgment is reversed, and a new trial ordered.

On the second trial, Spencer made no defense, and the other defendants answered by a general denial. The jury found a verdict against all the defendants, and judgment was entered thereon, from which the defendants, who had answered, appealed, and the judgment below was affirmed: *Fredendall v. Taylor*, 26 Wis. 286, 291. It was said in the opinion, by Dixon, C. J., that the case was in no respect different from what it was when before the court on the former appeal; that there was sufficient testimony upon all the points to sustain the verdict; that the instructions given to the jury were full, fair, and correct; and he held that the liability of the defendants arose from "the fact that there was no responsible body or corporation behind them, which they could bind, and against which the plaintiff could have had his remedy. When, therefore, Spencer was acting in the name of the association by the direction of these defendants, he was, for all purposes of this action, acting in their names, and binding them personally by his contract; and when they ratified his acts or contract, although in form as officers of the association, it was, in legal effect and operation, as individuals and not as officers. Upon such ratification, it became their personal contract or obligation, the same as if they had originally entered into it."

POWER OF VOLUNTARY ASSOCIATION TO BIND MEMBERS BY CONTRACTS: See *Austin v. Searing*, 69 Am. Dec. 665, and note 678.

SUITS BY AND AGAINST UNINCORPORATED SOCIETY: *Phipps v. Jones*, 59 Am. Dec. 708, and extended note 711.

MEMBER OF UNINCORPORATED DITCH COMPANY HAS NO GENERAL AUTHORITY, by virtue of such membership, to bind the company by his contracts: *McConnell v. Denver*, 95 Am. Dec. 107.

DEAN v. CHARLTON.

[28 WISCONSIN, 590.]

POWER OF CITY TO IMPROVE STREETS AT EXPENSE OF LOT-OWNERS. — A city was empowered by its charter to improve streets at the expense of adjoining lot-owners, but only under contract let to the lowest bidder: *Held*, that the city could not contract for laying a patented pavement at the expense of such lot-owners, the exclusive right to lay which was patented and owned by one firm, although such firm was willing to permit any one to use the patent in that city at a fixed royalty.

COURT OF EQUITY WILL INTERFERE BY INJUNCTION TO RESTRAIN COLLECTION of an illegal and void special assessment, though there is nothing to show it to be inequitable.

ILLEGAL ASSESSMENT — CONDITIONS OF EQUITABLE RELIEF. — A special tax was assessed on the plaintiff's lots for grading and paving a street. The contract for grading was legal, but that for paving was illegal. In this action to enjoin the collection of the tax, *held*, that the plaintiff was not required, under the circumstances, to pay the expense of the grading as a condition of relief against the assessment for paving.

WHERE CITY IMPROVEMENT WAS UNAUTHORIZED AT TIME IT WAS CONTRACTED FOR and made, the legislature may subsequently confer authority on the city council to adopt it, and to assess and collect a tax to pay for it.

WISCONSIN STATUTE PROVIDING THAT ANY TAX OR ASSESSMENT WHICH HAS BEEN SET ASIDE, by reason of irregularities or defects, may be reassessed, etc., has no application to a case where the tax or assessment was not authorized by law.

ACTION seeking to enjoin the sale of certain city lots for the amount of a special tax imposed upon them for paving and grading the adjoining street, and also to have the tax declared illegal, etc. The material facts appear in the opinion. The court held, as conclusions of law, that the contracts for grading and paving, and the special tax assessed upon the plaintiff to pay for the work done under them, were legal and valid, and judgment was entered accordingly. The plaintiff appealed.

J. M. Flower, and Spooner and Lamb, with George B. Smith, for the appellant.

James G. Jenkins, with Hopkins and Foote, for the respondents.

By Court, PAINE, J. This action was brought to enjoin the sale of the plaintiff's lands for an assessment imposed upon them for paving the streets in front of them with what is known as the Nicholson pavement. It is claimed that the proceedings failed in several respects to comply with the provisions of the charter in matters so essential as to render the tax void. But another objection is taken, which goes to the foundation of the whole proceeding; and the conclusion to which a majority of the court have come upon that will preclude the necessity of examining any of the other questions. This objection is based upon the provisions of the charter requiring all work to be let by contract to the lowest bidder, and the fact that the right to lay the Nicholson pavement is a patented right, and was owned for the state of Wisconsin by one firm in the city

of Milwaukee. It is said that the charter authorizes a contract only for such work as is open to competition, and that this work was not open to competition, because nobody had any legal right to do it except the one firm that owned the patent. Upon these facts alone, the objection seems to me unanswerable. And nothing seems to be necessary beyond the simple statement of the requirements of the charter as to the mode of letting work, and the fact that this right was a monopoly, to show that the charter is inapplicable to it, and that a contract for this work would be in violation of the necessary implication from its provisions. Indeed, the counsel for the respondent, by their course of argument, seemed tacitly to admit that there was an apparent incongruity in applying the provisions of the charter to a contract for such work as this. And they sought to avoid it in two modes. First, they claimed that if it was clear that the charter could not be applied in such a case,—that it would be a mere farce to advertise to let to the lowest bidder work which only one firm had any legal right to do, so that the very object of the charter, to procure the work to be done as cheaply as possible, might be defeated thereby,—then it must be assumed that the legislature did not intend the mode provided in the charter to be applicable, and that the work might be contracted for without regard to that mode.

The other mode of avoiding the objection was by proving that the owners of the patent were anxious and willing to sell the royalty, and had offered it for sixteen cents per square yard. And upon this proof it is insisted that the principle of competition was preserved, and the requirements of the charter complied with.

I will state as briefly as may be why I think neither of these theories overcomes the objection. The first assumes the correctness of the position that the charter cannot be applied to a contract for work, the right to do which is a patented monopoly. And it then infers that because the charter is inapplicable, the city had the general power to make the contract without regard to its restrictions, and that such was the legislative intent. The error lies in this inference. This position was attempted to be supported mainly by the case of *Harlem Gas Co. v. Mayor etc.*, 33 N. Y. 309. The counsel on both sides rely upon that case, and it will therefore be proper to examine it carefully to see what position it sustains.

The action was on a contract for lighting certain streets in

New York City with gas. The company had by law the exclusive right to furnish gas for that part of the city. The charter required all contracts for work and supplies, beyond a certain limitation in value which this contract far exceeded, to be let by contract to the lowest bidder. The contract for this gas was not so let, and therefore it was claimed to be void. The court held that, inasmuch as the company had the exclusive right to furnish the gas, the provision of the charter requiring the contract to be let to the lowest bidder was inapplicable, and that it would be absurd to attempt to apply the provision in such a case. Porter, J., says: "In the present case, an adoption of the construction claimed by the municipal authorities would lead to the absurd conclusion that the legislature designed to force a provision into the city charter compelling the corporation to pay whatever price the sole bidder might choose to exact in his sealed proposals for the use of property in which he has an absolute monopoly, and in relation to which there can be no competition within the range of legal possibility."

Brown, J., says: "Had the common council, in place of this condition, invited proposals in the usual form, there could have been but a single offer at best, and the provisions of the statute would have failed of effect, because they were not applicable to such a subject."

The case therefore fully sustains the position of the appellant's counsel, which seems obvious enough in itself, that a provision requiring work to be let to the lowest bidder is not applicable to a contract for work as to which there can be no competition. And if not applicable to it, of course it can furnish no authority for such a contract. And if such a contract is made, it must be sustained, if at all, by authority derived from some other source than such a provision of the charter.

But the court in that case did hold the contract valid, and the city liable. And this branch of the decision the respondents' counsel rely on to sustain their position, that if the charter was inapplicable, these proceedings should be sustained, whether conducted in accordance with it or not. But the cases are so different in respect to the grounds of that part of the decision that it becomes inapplicable here. The power to contract for the lighting of the streets of the city was assumed, in that case, to be one of the general powers of a municipal corporation. Hence, so soon as the court came to the conclusion that the mode of contracting pointed out in the charter

was inapplicable in such a case as they had under consideration, they had no difficulty in sustaining the contract under the general corporate power of the city. But here the question is quite different. It is not necessary to inquire whether the city of Madison, by virtue of its existence as a municipal corporation, would have had the power to contract for paving its streets with the Nicholson pavement at the expense of the city, after discovering that the provisions of the charter enabling it to cause its streets to be paved at the expense of the lots were inapplicable for that purpose. If it had had such power, and had made such a contract binding the city at large, the question would then have been like that decided by the New York court. But here it made no such attempt. It seeks here to charge the expense upon the lots, and this it has no general power to do by virtue of its mere existence as a municipal corporation; but if done at all, it can only be done under the statutory authority in its charter, and by complying substantially, if not strictly, with all its requirements. So soon, therefore, as we arrive at the conclusion that these requirements are inapplicable and inadequate to a contract for a work, the right to do which is an exclusive monopoly, it ends the question; for there is no general power of the city to fall back upon.

I think, therefore, that while the case in New York does show that the contract in this case was outside of the scope of the provisions of the charter, it fails to show any general authority in the city by which it could be sustained independent of those provisions. In truth, it would seem too late for us now to say that these requirements of the charter are not applicable to contracts for paving streets, for the contrary has uniformly been held by this and other courts: *Myrick v. La Crosse*, 17 Wis. 442; *Mitchell v. Milwaukee*, 18 Id. 92; *Kneeland v. Furlong*, 20 Id. 437; *Brady v. New York*, 20 N. Y. 312.

Neither can I see that the other mode of answering the objection is successful. On proof that the owners of the patent were willing to sell the "royalty," as it is called, for sixteen cents per yard, it is said that other parties might have bid, and the principle of competition was preserved. If an arrangement had previously been made, by which the owners of the patent became bound to transfer the right at sixteen cents per yard, and the contracts had then been let, in pursuance of the charter, for the materials and labor, subject to the condition of obtaining the patent, the principle of competition, so far as the labor and materials were concerned, might have been pre-

served. But even in that case there could have been no competition as to the price of the royalty. So far as that constituted a part of the cost, there was no possibility of introducing this principle at all. But if the method suggested had been resorted to, so as to preserve competition in the labor and materials, perhaps the fact that it could not be preserved as to the comparatively small balance of the expense would not have avoided the whole. It is unnecessary to determine whether so strict an application of the spirit of the charter would have been required.

But no such method was resorted to. On the contrary, the proposals were for furnishing the materials and doing the work, without anything in regard to the price of the royalty, and without any previous agreement with the owners of it. There could be no competition in this method. The fact that the owners were willing to sell it at sixteen cents per yard does not show that there could have been. For, assuming that any contractor might have safely relied on the willingness of the owners to sell it at that price, and assuming that the latter, in case they desired to bid for the work themselves, would not use their power over the patent to aid in obtaining the contract, as far as possible, by preventing others from getting it,—assumptions which it would scarcely be safe for contractors to act upon,—still there could have been no safety in bidding. For, suppose A, B, and C all bid, none of them making any previous arrangement for the purchase of the royalty; before the bids are opened, one of them, thinking to get the contract, desiring in good faith to do the work, goes to the owner of the patent and buys the royalty for that part of the city where the work is ordered to be done; the bids are opened, and some one else has the lowest bid, and gets the contract; what position would the successful bidder be in, bound under somewhat severe penalties to enter into and complete his contract, and yet with a rival and disappointed bidder having the sole legal right to do the work? Certainly this shows that no contractor could safely bid, and bind himself, in the manner here required, with sureties and stipulated damages for a failure, without in the first place procuring the right from the owners. For although they might be willing to sell, that very willingness would make it unsafe for him, because some other bidder might step in and secure the right, in anticipation of the opening of the bids. But if any contractor should, before bidding, purchase the right, then nobody except

him could safely bid. It seems clear, therefore, that proof merely of the willingness of the owners to sell the right at a fixed price does not preserve competition. And the result in this instance, if not conclusive, is yet very satisfactory proof of it. There was no bid except that of the owners of the patent.

It has been compared to the case of work ordered to be done with a particular kind of stone, the quarry of which is owned by one who is willing to sell to all alike at a fixed price. Undoubtedly in that case there might be free competition. If the owner of the quarry, before the contract was let, should sell to one bidder enough stone for that work, he might the next day sell as much to another bidder. And if neither of these should get it, he might afterwards sell whatever was needed to such person as did get the contract. Such being the case, any bidder could safely wait until he obtained the contract before making arrangements for his stone. But there is a marked difference in the case of the patent. There the owner, having disposed of the right for any particular district to one person, cannot afterward furnish the same right to any other. This difference destroys the whole force of the illustration, and shows that the safety of bidders would be very different in the two cases.

It seems to me, therefore, a conclusion derivable from the very nature of the case, that competition could not be and was not preserved in the letting of this contract; and that it was, therefore, beyond the scope and in violation of the spirit of the charter.

It may be said that this pavement is of a superior character, and that it is very desirable that cities should have authority to cause it to be laid. It may be so; but if so, I think the aid of the legislature will have to be invoked, and that there is no authority to contract for it under charters which require the work to be let by contract to the lowest bidder.

It was suggested that even though this assessment should be held illegal, still there was nothing to show it to be inequitable, and therefore a court of equity ought not to interfere. But that principle has never been applied to these special assessments. And certainly it could not be applied where there is no legal authority to contract for the work at all, to pay for which the assessment was imposed.

I think the judgment should be reversed, and the cause remanded, with directions to enter judgment for the plaintiff

for a perpetual injunction according to the prayer of the complaint.

Ordered accordingly.

DIXON, C. J., dissented.

On a motion for a rehearing, the respondents urged that the contract for grading the street was legal, and ought to have been allowed, even though the city council had no power to contract for laying the Nicholson pavement. In denying the motion, Paine, J., said: "We have come to the conclusion that so long as we adhere to the decision on the main question, there is not a sufficiently clear ground to justify us in interfering in this action to compel a separate compensation for the grading. The grading, although let by a separate contract, was merely accessory to the principal contract for paving the street." It was further claimed, in support of the motion, that even if this pavement was unauthorized at the time it was contracted for, yet the legislature may subsequently confer authority upon the council to adopt it, and to assess and collect a tax for it, and it was insisted that the legislature had already done this by the enactment of chapter 132, Laws of 1868. The court, while conceding that the legislature may confer such authority, held that the statute mentioned applies only to such taxes and assessments as were authorized by law, and does not extend to the reassessment of a tax which was defective, not on account of mere irregularity in the proceedings, but for an entire want of authority, which was the ground of the objection to the tax in question.

DIXON, C. J., in his dissenting opinion, referred to and approved the case of *Hobart v. City of Detroit*, 17 Mich. 246, which was decided by the supreme court of Michigan, pending the motion for a rehearing of the principal case. The questions involved in the two cases were the same, and the Michigan court held that where a city charter provides that no contracts shall be made by the city except with the lowest bidder, after advertisement of proposals, it does not prevent the city from contracting for a patented article, such as the Nicholson pavement, although, in point of fact, the only bidder was the patentee, who held a monopoly of the article. This holding is approved in the following language: "The decision there is the reverse of that here made, and the opinion of the court by Chief Justice Cooley is such a clear and able statement and vindication of my own views, that I have thrown aside an opinion partially written before the report came to hand, and am entirely satisfied with a mere reference to that case."

POWER OF LEGISLATURE TO SUPPLY DEFECTS IN ASSESSMENTS FOR TAXES: *People v. Seymour*, 76 Am. Dec. 521, and extended note 527; but void assessments cannot be cured: *Id.* 529; reassessment, and what defects may be cured by: *Id.* 535-537.

INJUNCTION WILL LIE TO RESTRAIN COLLECTION OF TAX WHICH IS ILLEGAL, or levied without authority of law, or by persons having no authority to do so, or in case of fraud: *Town of Ottawa v. Walker*, 74 Am. Dec. 121, and note 123; and see *Holland v. Mayor etc.*, 69 *Id.* 195, and note 198; but it was held that equity will not enjoin collection of tax illegally assessed, where no special equities are shown, in *Greene v. Mumford*, 73 *Id.* 79. Compare *Moss v. Anderson*, 76 *Id.* 704; *O'Neal v. Virginia etc. Bridge Co.*, 79 *Id.* 689.

THE PRINCIPAL CASE IS CITED to the fifth point stated in the *syllabus*, relative to the right to reassess a tax under the provisions of chapter 132, Laws

of 1868, in *Rork v. Smith*, 55 Wis. 83; and see *Dean v. Charlton*, 27 Id. 522. The power of the legislature to authorize the reassessment and relevy of taxes or special assessments, where the same as first assessed were void for some irregularity in the proceedings, or some want of power in the local authorities, is reaffirmed, citing the principal case, in *Mills v. Charlton*, 29 Id. 400, 411; and *Evans v. Sharp*, 29 Id. 563, which was an action to restrain proceedings upon a reassessment to pay for a Nicholson pavement laid down in one of the streets of the city of Oshkosh, the original assessment for which had failed and been set aside for the same reason as in the principal case; and in *Mills v. Charlton*, 29 Id. 400. The last two cases are followed in *Dean v. Borchsenius*, 30 Id. 236, also citing the principal case, and affirming the validity of chapter 316, Laws of 1869, authorizing the reassessment and collection of certain special assessments upon adjoining lots to pay for constructing the Nicholson pavement upon certain streets in the city of Madison, where the first assessment had been adjudged invalid and its collection enjoined. Of this case the court say: "The action springs in part from the same state of facts presented in the principal case, and a sufficient history of the past litigation, and of the decisions of this court made in it, will be obtained from a reading of the principal case, and of the still more recent one of *Mills v. Charlton*, 29 Id. 400." The principal case is followed in *Dean v. Borchsenius*, 30 Id. 244; *Blount v. City of Janesville*, 31 Id. 655, holding that, although the expense of grading a street is by the charter chargeable to the lots on both sides of such street throughout its whole extent, yet where the grading, though let by a separate contract, is merely accessory to the laying of the Nicholson pavement, it may be properly assessed upon the contiguous lots alone, as a part of the expense of paving.

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

BELDING v. STATE.

[25 ARKANSAS, 315.]

COURT WILL JUDICIALLY NOTICE that in September, 1867, the civil state government of Arkansas was provisional, and that the commanders of the United States military forces, by acts of Congress and orders of the President, were then clothed with power and authority to arrest and imprison citizens who willfully violated the laws, regulations, and rules prescribed by the federal government.

IMPRISONMENT OF CITIZEN BY LEGITIMATE ORDERS of a military commander has the same force and effect as if he were confined upon a proper warrant from a civil tribunal.

ACT OF GOD, OF OBLIGE, OR OF LAW, will excuse a surety in a recognizance conditioned for the appearance of his principal to answer an indictment.

RECOGNIZANCE AND RECORD OF ITS FORFEITURE raises a strong presumption of the liability of the surety.

IF SURETY IN RECOGNIZANCE CAN SHOW by legitimate and satisfactory proof that his principal was duly arrested and imprisoned, and beyond the reach of his power at the time of the forfeiture of the bond, he is excused from liability for the non-appearance of his principal.

THE opinion states the facts.

Garland and Nash, for the appellant.

Montgomery, attorney-general, for the appellee.

By Court, GREGG, J. It appears of record that on the ninth day of May, 1867, one Kelly Caruthers and the appellant entered into recognizance in the sum of \$120, before the sheriff of Hot Spring County, conditioned that the said Caruthers should appear at the following September term of the circuit court of said county, to answer an indictment for gaming. He failed to appear, a forfeiture was ordered, and

an interlocutory judgment entered against him and the appellant. A *scire facias* was issued, and at the September term, 1868, the appellant appeared, and for cause why final judgment should not be rendered against him, responded that Caruthers had been arrested by the military authorities of this department, and imprisoned at Little Rock, and afterwards at Vicksburg, and could not then be produced in court. The state demurred to the response; the court sustained the demurrer; the appellant rested; a discontinuance was taken as to Caruthers, who had not been served with notice, and final judgment rendered against Belding, from which he has appealed.

We might infer that the court sustained the demurrer because of defective averments in the response, but we pass to the main question: Does an arrest and imprisonment for another crime constitute a valid defense for the security upon a forfeited recognizance?

The appellee's counsel insist the record shows no legal imprisonment of Caruthers.

The courts judicially take cognizance of the *status* of the state at the date of the alleged forfeiture; and in so doing, recognize the fact that the civil state government was then provisional, and that the commanders of the United States military forces, by acts of Congress and orders of the President of the United States, were then clothed with power and authority to arrest and imprison citizens who willfully violated the laws, rules, and regulations prescribed by the federal government for their guide, action, and enforcement; and consequently, if Caruthers was imprisoned by the legitimate orders of the commander of this district or department, such imprisonment had the same force and effect as if he had been confined upon a proper warrant from a civil judicial tribunal.

In the case of *People v. Bartlett*, 3 Hill, 570, which was a *scire facias* on a thousand dollars forfeited recognizance, which was conditioned for the appearance of the principal to answer an indictment for larceny, the security pleaded that, after the giving of the recognizance, his principal had been indicted and convicted in another county, and upon that conviction was imprisoned, the court held the defense good; it was an act of the law which rendered it impossible for the security to produce him in court. The act of God, of the obligee, or of the law, may excuse: *Canby v. Griffin*, 3 Harr. (Del.) 333; Co. Lit. 206; *Coster v. Dilworth*, 8 Cow. 299.

In *Hunt's Case*, 3 Peterdorff's Abridgment, the defendant was bailed upon a charge of treason. The security appeared, and moved that the recognizance be estreated, showing by affidavits that the principal had been violently taken by a body of French soldiers, and carried to France. The government attorney opposed, and he alleged that the arrest was connived at by the principal. The court said: "If connived at, it would work a forfeiture, and they can come in and controvert in exchequer; therefore, a *scire facias* is awarded against the bail, on which it will finally be determined, for it is a good plea, if true."

The recognizance of the appellant, and the record of its forfeiture, raises a very strong presumption of his liability; but if he can maintain by proof, legitimate and satisfactory, to the court that Caruthers was duly arrested and imprisoned, and beyond the reach of his power at the time of the forfeiture, it will be a sufficient answer to the *scire facias*; therefore, the judgment of the circuit court is reversed, and the case remanded for further proceedings.

WHAT WILL EXCUSE SURETY OR BAIL FROM PRODUCING PRINCIPAL. — *Act of God, of Law, or of Obligee.* — It is an almost universally acknowledged rule that where the condition, either in a bond or a recognizance, becomes impossible of performance by the act of God, of the obligee, of the law, or of the counsel, the performance on the part of the surety or bail is excused: *Taintor v. Taylor*, 32 Conn. 242-252; S. C., 4 Am. Rep. 58; 16 Wall. 366; *Steelman v. Mattia*, 38 N. J. L. 247-249; S. C., 20 Am. Rep. 389; *People v. Manning*, 18 Am. Dec. 451, and cases in note thereto 452. The act of God rendering the performance of the condition in the bond impossible, always discharges the party bound from performing the obligation: *Scully v. Kirkpatrick*, 79 Pa. St. 324; S. C., 21 Am. Rep. 62. Thus where the principal in a bail bond dies before judgment is rendered against the surety so as to put it out of the power of the latter to surrender him in execution, the bail is discharged: *Wakefield v. McKinnell*, 9 La. 449; *Scully v. Kirkpatrick*, *supra*. The liability of the bail is not fixed absolutely until final judgment against him. He has a right to surrender his principal at any time before that, so if the latter dies between the return of *non est inventus* and final judgment against the surety, he is discharged from liability as bail: *Griffin v. Moore*, 2 Ga. 331; *Mather v. People*, 12 Ill. 9. The death of the principal in a hasty bond discharges the surety for sums accruing thereafter: *Ott v. Haslett*, 14 Phila. 138. So where judgment is entered on a forfeited recognizance, it will be vacated if, after such forfeiture, the surety has been prevented from retaking or surrendering the principal by the death of the latter: *People v. Wissig*, 7 Daly, 23. Death of the principal after forfeiture, but before judgment thereon, releases the sureties in the recognizance: *State v. Cone*, 32 Ga. 663. So when bail cannot reasonably anticipate and prevent default, and with proper diligence find or surrender the principal after default, and before his death intervened to prevent, the surety will be released from liability

on his bond: *State v. Trepelagen*, 45 N. J. L. 134. It seems that after a return of *non est inventus* against the principal, his death will not discharge his surety: *Hamilton v. Dunklee*, 1 N. H. 172; *Goodwin v. Smith*, 4 Id. 29; *Olcott v. Lilly*, 4 Johns. 406; *Bradford v. Marle*, 4 Pick. 120; and the death of the principal two years after the forfeiture of his bail is no defense for the surety when sued on the bond: *State v. Scott*, 20 Iowa, 63.

As a general rule, the inability of the principal, by reason of sickness, to appear and answer at the time set, according to the terms of his recognizance, is a good defense to an action brought against his sureties upon the recognizance: *People v. Tuttle*, 37 N. Y. 586. In this case, the disability of the principal to appear was caused by a fall from a horse just prior to the term of the court when he should have answered, and the court held this to be such an act of God as to excuse the sureties. So where it appeared from the evidence that the principal was confined to his room and bed by sickness during the entire term at which he should have appeared, and at which his bail was declared forfeited, the judgment of forfeiture was held to be erroneous, as the sickness of the principal should have relieved the sureties of liability, especially where the former appeared and stood trial before final judgment against the latter: *Baker v. State*, 5 S. W. Rep. 130 (Tex.). Thus where the principal in a prison bond was taken sick about ten days before the expiration of the forty days given him by the condition of the bond to file his schedule, and he continued sick until after the expiration of such forty days, when he died, without having filed the schedule, it was held that if his sickness was such as to incapacitate him from filing the schedule, his bond was not forfeited, and his surety not liable: *Blackwell v. Wilson*, 2 Rich. 322. So where in a suit on the bond against the surety, it was shown that the principal had been stricken down by sickness at a distance from the place of hearing, so as to be prevented from appearing at the time fixed, and he appeared as soon as he was able, after his recovery, it was held that the sickness was a defense to the suit: *Scully v. Kirkpatrick*, 79 Pa. St. 324; 8 O., 21 Am. Rep. 62. In this case, the court say that when the act to be performed is of a purely personal character, which can be done only by the party himself, the act of God in producing sickness or insanity, as well as death, will excuse performance. That sickness of the principal will excuse the surety, see *People v. Manning*, 18 Am. Dec. 451, and note. On the other hand, some instances are found where the sickness of the principal will not exonerate the bail. Thus to a *scire facias* on a recognizance the sureties pleaded the dangerous sickness of the principal in another state, and that he could not be surrendered without danger to his life, it was held that this did not excuse the sureties, and that nothing but the death of the principal is such act of God as will discharge the sureties: *Piercy v. People*, 10 Ill. App. 219. The same view is expressed in *Goodwin v. Smith*, 4 N. H. 29.

Act of Law. — Bail are entitled to relief where the surrender of the principal is made impossible by act of the law, on the principle that, as the power of making the surrender is taken away by act of law, the obligation to surrender is discharged by law, — as the surety cannot by law surrender his principal, he cannot be held answerable for not surrendering him: *Steelman v. Mattia*, 38 N. J. L. 247-249; 8 O., 20 Am. Rep. 389. The act of law which renders the performance impossible, and therefore excuses and discharges bail, must be a law operative in the state, where the obligation was assumed, and obligatory in its effect upon her authorities: *Taylor v. Taintor*, 16 Wall. 366. Where the right to imprison the principal for debt is abolished by act of the legislature previous to the time within which the principal might have

been surrendered, the bail are entitled to their discharge: *White v. Blake*, 22 Wend. 612; *Kelly v. Henderson*, 1 Pa. St. 495; *Frey v. Hebenstreit*, 1 Rob. (La.) 561; *Brown v. Dillahunty*, 4 Smedes & M. 713; S. O., 43 Am. Rep. 499; *Parker v. Sterling*, 10 Ohio, 357; *Ware v. Miller*, 11 S. O. 13. So where the master enters into a recognizance for the appearance of his slave to answer to an indictment, the subsequent emancipation of the slave discharges the master from the obligation in the recognizance: *Lewis v. State*, 41 Miss. 686; *State v. Berry*, 34 Ga. 546. The surety is discharged where the principal is released under insolvent laws for debt contracted in another state: *McGlenasy v. McLearn*, 1 Harr. (Del.) 466; *Kennedy v. Adams*, 5 Id. 160.

Surrender of Principal.—Where the principal voluntarily surrenders himself, or is surrendered by his bail, to the proper authorities before the day stipulated in the bond, the surety is discharged. Such is the rule in both civil and criminal cases: *Harp v. Osgood*, 2 Hill, 216. The principal may make a voluntary surrender of himself without the agency, or even knowledge of his bail; and placing himself in the custody of an officer, for the purpose of being detained, is an effectual surrender by the principal to discharge the surety: *Dick v. Stoker*, 1 Dev. 91. So where an insolvent fails to obtain his discharge as an insolvent debtor, and voluntarily surrenders himself to the warden of the jail of the county, he complies with the alternative condition in the bond that he shall surrender himself to the jail of the county, and though such officer refuses to receive him, his bond is void, and his sureties released: *Saunders v. Quigg*, 112 Pa. St. 546. Where a defendant surrenders himself when a judgment to pay a fine is rendered against him, his bail are released from liability on the bond conditioned that he should appear, and if convicted, should render himself in execution, etc.: *Mitchell v. Commonwealth*, 12 Bush, 247. Where the sureties agree to surrender the principal, and are requested not to do so, and it is agreed to release them from the recognizance if they do not make the surrender, they are released from liability; or if they surrender the principal, and he is afterwards discharged by due process of law, they are likewise released: *Shields v. Smith*, 78 Ind. 425. So if the sureties surrender their principal to an officer whom they believe to be an officer *de jure* as well as *de facto*, they are discharged: *Quarter v. State*, 43 Ark. 132. But the surrender to a deputy sheriff of a party under bail to appear and answer will not discharge his sureties. This has been held on the ground that the surrender should have been made to an officer who had power to commit the principal to prison, and this the deputy could not do: *State v. Le Cierf*, 1 Bail. 410. An administrator may surrender the principal for whom his intestate was bail: *Wheeler v. Wheeler*, 7 Mass. 168. Bail has a right to surrender the principal at any time before final judgment on *scire facias*, and the death of the party between the return of *non est inventus* and such final judgment will discharge the bail: *Griffin v. Moore*, 2 Ga. 331. So if the principal is surrendered within a reasonable time after the return of *non est inventus*, the bail is exonerated: *Edwards v. Gunn*, 3 Conn. 316. And though the bail is indemnified by their principal, yet they will be discharged if the surrender is made within eight days after the return against the bail: *Brownlow v. Forbes*, 2 Johns. 101. The bail may surrender his principal by causing his arrest, which is equivalent to a delivery, and releases the bail from liability on the bond: *Sternberg v. State*, 42 Ark. 127; *Reese v. United States*, 9 Wall. 13; *Commonwealth v. Bronson*, 14 B. Mon. 361. If one of several sureties in the bond surrenders the principal, this absolves all the sureties from liability, though the principal afterwards escapes: *State v. Doyal*, 12 La. Ann. 653.

Arrest of Principal. — The accused, when admitted to bail, is in legal contemplation delivered into the custody of his bail, who then have the right to take and surrender him in discharge of their liability at any time before the forfeiture of the bond, and it seems that a warrant is unnecessary to protect the bail in arresting the principal: *State v. Cunningham*, 10 La. Ann. 393. The arrest and imprisonment of the principal is, in law, a satisfaction of the judgment so long as the imprisonment continues, and during that time no action can be maintained against the surety: *Kenig v. Steckel*, 58 N. Y. 475; *Sunderland v. Loder*, 5 Wend. 58. The bail may deputize another to arrest the principal, and he may be taken in another state at any time, in any place, and in almost any manner, as the bail or the person deputed may break open outer doors in order to take the principal: *Nicolls v. Ingersoll*, 7 Johns. 145; *State v. Mahon*, 3 Harr. (Del.) 568; *Commonwealth v. Brickett*, 8 Pick. 137; *Ex parte Lafonta*, 2 Rob. (La.) 495; *Respublica v. Goaler of Philadelphia*, 2 Yeates, 263; *Parker v. Bidwell*, 3 Conn. 84. But it has been held that the surety, in a recognizance after forfeiture by the default of the principal and surety, has no right to surrender the principal in order to exonerate himself from liability, or to arrest and detain the principal for that purpose: 3 Cush. 454.

Service of Principal in Army. — As to whether the fact that the principal was engaged in military service, at the time that he should have appeared to answer the charge, will discharge his bail, presents some difficulty, as the authorities are somewhat in conflict; but the true rule seems to be, that if such service is involuntary and forced, either from draft, military arrest, or other cause, the bail are excused from producing their principal, and their liability as sureties discharged: *Commonwealth v. Webster*, 1 Bush, 616; *Alford v. Irwin*, 34 Ga. 25; *Commonwealth v. Terry*, 2 Duvall, 383; *People v. Cushney*, 44 Barb. 118. But where the service is voluntary, either from enlistment or other cause, the bail is not discharged: *Harrington v. Dennie*, 13 Mass. 92; *State v. Reaney*, 13 Md. 230; *Huggins v. People*, 39 Ill. 241. So where the surety voluntarily surrenders his principal to the military authorities to act as a substitute in the army, he is not discharged from producing him at the time fixed: *Shook v. People*, 39 Id. 443. And where, after forfeiture of the bond, the surety finds the principal in military service in another state, and causes his arrest for the purpose of surrendering him, but he is taken from the surety by military officers, this does not discharge the bail from liability: *State v. Scott*, 20 Iowa, 63. In *Gingrich v. People*, 34 Ill. 448, where it appeared that the principal, without the consent or knowledge of the surety, enlisted in the military service, and there remained, beyond the power of the surety to arrest or produce him, or his own power to surrender, it was held that though this was not a good defense in an action on the bond, still it was ground for a continuance.

Subsequent Arrest, Indictment, or Imprisonment of Principal. — Whether either of these steps will exonerate the bail is a question upon which there is great conflict of authority, and the cases are about equally divided; but it seems that sureties in a bail bond or recognizance are relieved from liability by the second arrest and bail of their principal upon the same indictment: *Peacock v. State*, 44 Tex. 11; *Roberts v. State*, 2 S. W. Rep. 622 (Tex.); *Lindley v. State*, 17 Tex. App. 120. The same rule prevails where the accused is rearrested, and escapes from jail during his second trial for the same offense: *Medlin v. Commonwealth*, 11 Bush, 605. So if the principal is rearrested, and escapes from the court-room during trial, the bail is discharged: *Smith v. Kitchens*, 51 Ga. 158; S. C., 21 Am. Rep. 232. Bail in a criminal case are discharged from liability by the arrest of the principal upon

the same charge in the same state by federal authority, and his imprisonment in another state: *Commonwealth v. Overly*, 80 Ky. 206; S. C., 44 Am. Rep. 471. The sureties are exonerated by the commitment of the principal on an *alias* execution after a return of *non est inventus* on the first: *Warren v. Gilmore*, 3 Oush. 15. After a defendant in a *ca. sc.* has given a bond, and is rearrested at the instance of the plaintiff, the surety is discharged: *Bell v. Ransom*, 30 Ga. 712. Bail in a criminal case are exonerated from liability by the surrender of the principal by the governor of the state to the authorities of another state upon requisition papers: *State v. Allen*, 2 Humph. 258; *State v. Adams*, 3 Head. 259. Where the principal was under bonds to appear, and did appear, and was indicted and bound over, whereupon he was arrested to answer the indictment, and he then applied for his discharge, on the ground that he was under bonds, and was discharged, but did not appear for trial, it was held that the sureties were discharged; for, say the court, "when by virtue of a warrant lawfully issued upon an indictment for the identical offense for which he was held to answer, the sheriff had, by his arrest, taken the prisoner out of the custody of his sureties. . . . Nothing short of a new bond, lawfully executed by them, would restore him thereto": *Smith v. State*, 12 Neb. 309. The sureties are discharged when the principal is convicted of felony, and imprisoned for that crime, before the time for his appearance on the bond: *Canby v. Griffin*, 3 Harr. (Del.) 333; *Way v. Wright*, 5 Met. 381; *Cooper v. State*, 5 Tex. App. 215; S. C., 32 Am. Rep. 571; *Caldwell v. Commonwealth*, 14 Gratt. 698. Or if he is insane, and confined in an asylum: *Fuller v. Davis*, 1 Gray, 612.

It has been held that the sureties in a bond are not responsible for the failure of the principal to appear, when he has been arrested and removed from the county or state: *Commonwealth v. Webster*, 1 Bush, 616; *People v. Bartlett*, 3 Hill, 570. But exactly the contrary doctrine is maintained, and the bail held liable, in *State v. Merrihue*, 47 Iowa, 112; S. C., 29 Am. Rep. 464; *Taintor v. Taylor*, 36 Conn. 242; S. C., 4 Am. Rep. 58. And if the principal is convicted of another crime in a different state, and is imprisoned there at the time that he should appear to answer to the first charge, the sureties on his bond to appear and answer the latter charge are not excused: *Cain v. State*, 55 Ala. 170; *King v. State*, 18 Neb. 375; *State v. Horn*, 70 Mo. 466; S. C., 35 Am. Rep. 437; *United States v. Van Fossen*, 1 Dill. 407; *Devine v. State*, 5 Sneed, 622; *State v. Burnham*, 44 Me. 278. So if the principal is arrested, tried, and convicted of another crime subsequently to the execution of the bond, and escapes from custody, the sureties are not discharged: *Wheeler v. State*, 38 Tex. 173. Or if the principal is in prison for a subsequent crime not bailable, and escapes, the sureties are liable: *State v. Frith*, 14 La. 191.

The sureties are not discharged by the subsequent arrest of the principal on a different charge, and giving a bond with other sureties therefor: *West v. Colquitt*, 71 Ga. 559; S. C., 51 Am. Rep. 277; *Hartley v. Colquitt*, 72 Ga. 351. The conviction of the accused of a different offense before the condition in the first bond is broken does not excuse the sureties therein: *Smith v. Barber*, 6 Watts, 508. And the mere fact that he is in prison on conviction of another crime will not excuse his bail, unless such confinement is for life, or a long term in another state: *Van Schaick v. Trotter*, 6 Cow. 599.

Appearance of Principal. — If the bail bond or recognizance provides that the principal shall appear and not depart without leave of court, the sureties are not generally discharged if the accused appears and is put on trial, unless he is formally surrendered according to law: *Lee v. State*, 51 Miss. 665;

State v. Tiernan, 39 Iowa, 474; *State v. Martel*, 3 Rob. (La.) 22. But he must appear from day to day of the first term, or from term to term, until convicted or discharged: *Lee v. State*, 51 Miss. 665; *People v. Stager*, 10 Wend. 431; *Moore v. State*, 28 Ark. 480; *People v. McCoy*, 39 Barb. 73; *Chase v. People*, 2 Col. 528; *Dennard v. State*, 2 Ga. 137; *State v. Norment*, 12 La. 511. On the other hand, it has been held that the obligation of the sureties is discharged when the principal appears and submits himself to the jurisdiction of the court: *Wilson v. People*, 10 Ill. App. 357. And that after the trial has commenced and the jury are sworn, the bail are no longer liable for the appearance of the principal: *Willis v. Commonwealth*, 2 S. W. Rep. 654 (Ky.). So where the principal was bound to appear and abide the order of the court, and he did so appear, and was ordered to give a new bond, which he refused to do, his sureties were held to be relieved from liability on the first bond: *Naugatuck v. Bennett*, 51 Conn. 497. Again, where the principal was bound to appear and answer one charge, and he did so, and was indicted for another and distinct offense not based on the first, his bail were held discharged as to his appearance on the first indictment: 16 Iowa, 314. Where the principal appeared and was placed in custody, and while the jury were out considering their verdict, he escaped, it was held that the sureties were not liable: *Commonwealth v. Coleman*, 2 Met. (Ky.) 392; *Askins v. Commonwealth*, 1 Duvall, 275; *contra*, *Wintersoll v. Commonwealth*, 1 Id. 177; but if the principal is rearrested on a bench-warrant, the bail are not liable on the bond: *Smith v. Kitchens*, 51 Ga. 158. And after the jury have returned a verdict of guilty, the sureties are not liable if the principal escape: *Wilson v. Mason*, 14 La. Ann. 446.

Continuance, Change of Venue, etc. — Where the bail bond or recognizance is conditioned that the principal shall appear at the next term of court, etc., and he does so appear, but no proceedings are had, and the case is continued until a later term, the sureties are generally excused, and not liable for his appearance at such subsequent term. However, some cases are found holding the contrary doctrine: *State v. Plasencia*, 6 Rob. (La.) 417; *State v. Smith*, 66 N. C. 620; *State v. Ryan*, 23 Iowa, 406. Or if no term of court is held at the time specified for the appearance of the principal, his bail must produce him at the succeeding term: *Commonwealth v. Branch*, 1 Bush, 59. But the rule sustained by the major portion of the authorities seems to be that, where the principal is required to appear at a specified term, and the bond does not provide for his appearance from term to term, his appearance at the term named is a compliance with the condition in the bond, and his failure to appear at a subsequent term to which the case is continued will not subject the sureties to forfeiture of the bond: *Colquitt v. Smith*, 65 Ga. 341; *People v. Greene*, 5 Hill, 647; *Lamb v. State*, 73 Ga. 587; *People v. Swales*, 33 Hun, 208; *Jones v. State*, 11 Tex. App. 412; *Townsend v. People*, 14 Mich. 398. So if the principal appears, and the trial is postponed with notice to the principal that he will be notified when to appear, his bail cannot be declared forfeited if such notice is not given: *Flynn v. State*, 42 Ark. 315. Where the bail bond provides that the principal shall appear at the next term, and any subsequent term thereafter, the latter clause means at the next regular succeeding term, and not at any distant term to which a postponement may be had, without reference to any intervening term. So where the prosecution and the principal stipulated that the case may be postponed until an indefinite time, and not until the next regular term, it was held that the sureties and principal were released from obligation: *Reese v. United States*, 9 Wall. 13. Where the sureties are bound for the appearance of their

principal at a certain term of the county court, and the judge changes the venue from that to the circuit court, the sureties are not liable for a failure on the part of the principal to appear at the latter court: *Adams v. People*, 12 Ill. App. 380.

Indictment for Different Crime. — Where a principal was held to bail for his appearance upon a charge of swindling, and he was indicted for theft, and failed to appear, it was held that the indictment for theft would not support a judgment of forfeiture on the bail bond for swindling: *Addison v. State*, 14 Tex. App. 568. So in *People v. Sloper*, 1 Idaho, 158, the rule is stated to be that sureties for the appearance of the principal can only be held liable for his default, in the event that an indictment is found for the particular offense named in the undertaking. See also *People v. Hunter*, 10 Cal. 502. But in *People v. Meacham*, 74 Ill. 292, it is said that it does not matter whether the principal in the recognizance was examined on the charge for which he was indicted, or some other, provided it is a bailable offense; in the latter event the recognizance is good, and the sureties bound.

Quashing Indictment against the principal, who has given bail to appear and answer, is a discharge of the obligation, releases the surety, and authorizes the departure of the accused without leave: *People v. Fenton*, 36 Barb. 429. The same rule is held in *State v. Glenn*, 40 Ark. 332, where it is further said that a reversal of the judgment does not revive it.

Miscellaneous Instances where Bail are not Liable. — The sureties in a bail bond, executed by one admitted to bail pending an appeal, are not bound, where the charge is not such as will warrant a prosecution, and it is not shown that the sureties were actually aware of the charge preferred, and of which the accused was convicted, nor that they consented to become bound for his appearance to answer any charge but the one stated in the bond: *State v. Jones*, 3 La. Ann. 9.

Where the condition in the bond is not authorized by law, as where the condition is more onerous to the surety than that warranted, or where a beneficial condition is omitted, the bond cannot be enforced: *Thomas v. Stewart*, 2 Penr. & W. 475; *Tucker v. Davis*, 15 Ga. 573; *Lloyd v. McTeer*, 33 Id. 37; *Alexander v. Bates*, 33 Id. 125.

A recognizance taken by a sheriff of one county in another is extraofficial, and void: *Harris v. Simpson*, 4 Litt. 165. Pardon of the principal before conviction, if accepted by him, excuses the sureties, but if not accepted, they are liable: *Grubb v. Bullock*, 44 Ga. 379. Where the sureties give a note for the amount of the bail after judgment and forfeiture against the principal, and such judgment is reversed, the bail are not liable on the note: *Tappan v. Van Wagenen*, 3 Johns. 465.

So where bail was given pending an appeal, and the judgment against the principal was reversed, and the indictment was not prosecuted in the lower court, after which a new indictment was found for the same offense, it was held that the sureties on the old indictment were discharged, and that they were not liable on the one last found: *Lamb v. Smith*, 56 Ga. 589. The bail are exonerated by judgment of the lower court in favor of their principal, though the judgment is reversed on appeal: *Butler v. Bissel*, 1 Root, 102. Surety is not liable on the bond, where judgment is entered by agreement against one only of the principals named therein: *Commonwealth v. Clay*, 9 Phila. 121. The statute provided that the principal must be surrendered within ten days from judgment against him, but no execution issued within that time; at its expiration one did issue, when the principal offered to surrender and release

his sureties, but the sheriff, acting under instructions, refused to receive him: held that the sureties were discharged: *Allen v. Breslauer*, 8 Cal. 552.

Before bail can be held liable, the record must show that the principal was called, and failed to appear: *Park v. State*, 4 Ga. 329. Where the amount named in a bail bond is altered and increased by the principal, it is rendered void, and a parol assent to the change, without a delivery, will not validate it: *Lous v. Jordan*, 3 Gill, 327. Where the principal escapes through the assistance of the creditor, the sureties are not liable on the bond: *Conant v. Patterson*, 7 Vt. 163. An agreement between plaintiff's attorney and the sureties, that the principal shall be discharged, releases them: *Hughes v. Hollingsworth*, 1 Murph. 146. The surety is not liable, unless there has been an avoidance by the principal, and there could be no such avoidance unless the officer has used due diligence in serving the execution: *Beach v. Elliott*, 44 Conn. 237. Payment by one of joint judgment debtors of the judgment releases the sureties of all: *National etc. Bank v. Hummel*, 124 Mass. 260. Where one is committed for contempt, gives a bond to appear and answer, and he does so appear, is tried and fined for the contempt, and pays the fine, neither he nor his sureties are liable on the bond: *State v. Knott*, 13 Pac. Rep. 773. If the accused or his bondsmen appear after the forfeiture of bail, and before adjournment of court, with a satisfactory excuse, the forfeiture of bail will be discharged: *United States v. Eldredge*, 13 Id. 673; *United States v. Barger*, 20 Fed. Rep. 500.

Bail are exonerated, if the order of arrest is erroneously vacated on account of an alleged insufficient affidavit, and no stay of the order of vacation is granted, as the right to arrest or surrender the principal is taken away by such vacation and discharge: *Baker Mfg. Co. v. Fisher*, 35 Kan. 659. The discharge of the principal in a commission in bankruptcy discharges his bail: *Milner v. Green*, 2 Johns. Cas. 283. Where the court before which the principal obligor is bound to appear has no authority to require him to answer the charge against him, it has no power to declare his bail bond forfeited: *McGee v. State*, 11 Tex. App. 590.

CHRISTIAN v. CROCKER.

[25 ARKANSAS, 327.]

IN EQUITY, IF THERE IS MISJOINDER OF PARTIES PLAINTIFF, all the defendants may demur; but if the misjoinder is of parties defendant, those only can demur who are improperly joined.

OBJECTION OF MISJOINDER OF PARTIES DEFENDANT in a bill is a merely personal privilege.

AGREEMENT BETWEEN PARTNERSHIP AND LABORERS, that the latter are to have a share of a crop to be raised, as compensation for their services, does not make them members of the partnership, nor give them any right to contract debts against it; they need not, therefore, be made parties to a bill against it.

THE opinion contains the facts.

Watkins and Rose, for the appellant.

Garland and Nash, for the appellee.

By Court, McCLURE, J. It appears that Mary K. Christian and Evans L. Crocker entered into a partnership for keeping house and cultivating a plantation in the year 1867. As the fruit of their labors, they produced and gathered seven hundred bushels of corn, and sixteen bales of cotton, of about 450 pounds each.

On the 24th of December, 1867, the parties seemed to have looked over the partnership accounts, and from that examination, Crocker became satisfied that his interest in the crop would not pay his proportion of the partnership accounts then due, and turned his entire interest over to Mrs. Christian.

On the 13th of January, 1868, the firm of S. S. Bell & Co. attached the interest of Crocker in the sixteen bales of cotton for the sum of \$191.75 that said Crocker was indebted to said Bell & Co.

Mrs. Christian thereupon filed her bill, setting forth the partnership between herself and Crocker, with a full exhibit of all the assets and liabilities. In this bill, she makes Crocker and Bell & Co. parties defendant, and asks that a final settlement may be made of their partnership transactions.

In stating the indebtedness of the partnership, the plaintiff incidentally alleges that the laborers are to have for their labor one-third of the proceeds of the products produced.

It does not appear that Crocker was served with process; but at the February term, 1868, of the Ashley circuit court, Rolfe and Bell, who composed the firm of S. S. Bell & Co., filed their demurrer to the bill of Mrs. Christian, on the following grounds:—

1. That it appears by said bill that E. L. Crocker, who is made a party defendant, has no interest whatever in the subject-matter or object of this suit.

2. That the laborers employed by said complainant and said E. L. Crocker, and referred to in said bill of complaint, have an interest in this suit, and are entitled to be made parties.

3. Said bill is multifarious.

At the September term, 1868, the court sustained the demurrer, plaintiff took her exceptions, declined to amend her bill, and thereupon the court dismissed her bill, and she prayed an appeal to this court, which was granted.

We understand the law to be, if the misjoinder is of parties as plaintiffs, that all the defendants may demur; but if the

misjoinder is of parties defendant, those only can demur who are improperly joined: Story's Eq. Pl., sec. 544. Bell & Co. do not complain that they are improperly made defendants, but insist that Crocker is. The objection of misjoinder of parties as defendants in a bill is a mere personal privilege; and consequently those only can demur for that cause who are improperly joined: *Garland v. Nunn*, 11 Ark. 721.

The next objection is, that the laborers have an interest, and that they have not been made parties. The laborers were not members of the copartnership. The statement or fact that they were to have one third of the proceeds of the crop for their labor was a mere arrangement between the partnership and the laborers, whereby a compensation might be determined, — a mere share, in the nature of wages, unliquidated at the time, but capable of being reduced to a certainty on the sale of the crop. It will hardly be contended that these laborers had a right to contract any indebtedness against the firm of Christian and Crocker. If A lets B have his plantation, team, and farming implements, and B agrees to cultivate the same for one third the products, this does not constitute a partnership; it simply establishes a rule whereby the labor of B is to be compensated, — a rule by which the tenant may be paid.

It is said the bill is multifarious. We are unable to see wherein independent and distinct matters have been joined. The plaintiff asks for a settlement of the partnership, and an application of the assets to the extinguishment of the liabilities, and that, if there be a balance due to Crocker, it may be applied on the debt due from Crocker to Bell & Co.

The judgment is reversed, and this cause remanded to the Ashley circuit court.

HARRISON, J., being disqualified, did not sit in this case.

ONE UNNECESSARILY MADE PARTY TO BILL MAY DEMUR: *Bowden v. Schatell*, 23 Am. Dec. 170; *Fellows v. Fellows*, 15 Id. 412, and note 427.

AGREEMENT BY LABORER TO SHARE HALF the profits, instead of wages, whether makes him partner: *Ohandler v. Howland*, 66 Am. Dec. 487, and note; *Bromley v. Elliot*, 75 Id. 182, note 193; *Macy v. Combs*, 77 Id. 103, and note 107.

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HANAUER AND COMPANY v. GRAY.

[25 ARKANSAS, 260.]

IF FOR GOOD AND VALID CONSIDERATION one promises to do two things, one legal and the other illegal, the former is binding, unless the two are so mingled and bound together that they cannot be separated, in which case the whole is void.

PROMISE TO PAY NOTE IN CONFEDERATE BONDS or in Tennessee money will be enforced as to the latter, it being valid.

THE opinion states the facts.

Watkins and Rose, for the appellants.

Ratcliffe, for the appellee.

By Court, BOWEN, J. The appellee brought an action of *assumpsit* against the appellants, in the circuit court of Randolph County, upon a promissory note, payable in confederate bonds or Tennessee money, dated January 26, 1862, due at date.

Defendants, L. Hanauer & Co., filed a demurrer, which was overruled. They then pleaded *non assumpsit* and illegality of consideration. Plaintiff replied in short, upon the record. The cause was submitted to the court sitting as a jury, who declared the law to be, that "the note being the only evidence, and promise to pay in one of two articles, although one be illegal, the court will instruct in favor of the legal mode of performance of the contract"; and found in favor of the plaintiff in the sum of \$242.67, and entered judgment accordingly.

The defendants filed a motion for a new trial, which was overruled; also a motion to set aside and arrest the judgment, which was also overruled. The defendants excepted, and the cause comes to this court on appeal.

The bill of exceptions shows that the note was the only evidence in the circuit court, and reads as follows:—

"Due Daniel Gray \$180.56, payable in confederate bonds or Tennessee money. L. HANAUER & Co.

"POCAHONTAS, January 25, 1862."

The judgment was for \$242.67, being the amount of the note and interest, at the rate per cent fixed by statute, after the maturity of a note, and so far as the amount is concerned, seems to be correct.

The only question left, therefore, for our consideration, is in regard to the illegality of the promises. "A distinction must be taken between the cases in which the consideration is ille-

gal in part, and those in which the promise, founded on the consideration, is illegal in part. If any part of a consideration is illegal, the whole consideration is void, because public policy will not permit a party to enforce a promise which he has obtained by an illegal act or an illegal promise, although he may have connected with this act or promise another which is legal.

"But if one gives a good and valid consideration, and thereupon another promises to do two things,—one legal, and the other illegal,—he shall be held to do that which is legal, unless the two are so mingled and bound together that they cannot be separated, in which case the whole promise is void": See Parsons on Contracts, 380.

In this case, the payment was to be made in confederate bonds or Tennessee money, and the promises are not so mingled and bound together that they cannot be separated.

Passing by the promise to pay in confederate bonds, without expressing an opinion thereon, we will consider the promise to pay in Tennessee money. In the case of *Wilburn v. Greer*, 6 Ark. 257, and in the case of *Searcy v. Vance*, Mart. & Y. 225, Arkansas money and Tennessee money were respectively held to mean current coin of the United States. According to these authorities, no doubt can remain as to the legality of the promise to pay in Tennessee money.

The second plea of defendants set up that the note was given for supplies for the confederate army, to which plea plaintiff replied in short, upon the record; but as no evidence was offered in support of this plea, and no question as to the legal sufficiency of the facts stated therein raised, we see nothing demanding further consideration.

Judgment affirmed.

IF CONTRACT CONSISTS OF PARTS readily severable, and one part is void, while the other is valid, the contract will be enforced as to the part which is valid: *Treadwell v. Davis*, 94 Am. Dec. 770, and note 775; *Cobb v. Cowdery*, 94 Id. 370, and note 375. But if the consideration is inseparable and illegal, it vitiates the whole contract: *Patton v. Gilmer*, 94 Id. 665, and note 670.

NOTE IS WHOLLY VOID, IF PART of the consideration is illegal, and that part is inseparable from the part which is legal: *Potts v. Gray*, 91 Am. Dec. 294, and note 295.

SIMPSON v. MONTGOMERY.

[25 ARKANSAS, 265.]

ASSIGNMENT OF NOTE GIVEN FOR PURCHASE-MONEY for land conveyed by deed does not transfer the vendor's lien therefor.

DEED CAN BE ADMITTED TO RECORD only upon certificate of proof or acknowledgment of an authorized court or officer. If not so admitted to record, the registration does not make it notice to the world.

EQUITY RELIEVES AGAINST MISTAKES AND ACCIDENTS, not only as against original parties, but also those claiming under them with notice of the facts.

EQUITY WILL RELIEVE AGAINST MISTAKE of commissioner of deeds, who, being a commissioner for two states, by mistake, describes himself in his certificate of acknowledgment as commissioner of deeds for the wrong state.

BONA FIDE PURCHASER OF LAND, without notice of mistake in the certificate of a deed, does not by reconveying to his grantor thereby transmit to him the superior equity he acquired as an innocent purchaser.

AGREEMENT IS NOT CHAMPERTOUS where a trustee sells the land of one to another at public auction, and the creditors of the former agree to credit the amount of the bid on his notes held by them, and not to exact payment of the purchaser, unless the title acquired at the sale should prove to be valid; for the object of the sale is as fully accomplished as if the money had been paid to the trustee, and by him paid to the holders of the notes.

THE opinion contains the facts.

Garland and Nash, for the appellant.

Watkins and Rose, for the appellee.

By Court, HARRISON, J. The material facts in this case are these: William Park and wife, Henry Fitzgerald and wife, and James Simpson, on the twenty-fifth day of October, 1860, sold and conveyed to Andrew J. Montgomery, for the price of nine thousand three hundred dollars, certain lands in Crittenden County, and acknowledged in their deed the receipt of the purchase-money. Seven thousand two hundred and one dollars and eighty-four cents (\$7,201.84) of it, however, were not in fact paid, and for that amount Montgomery gave his five notes, as follows: To William Park, one for \$1,590.66, payable in one year, and one for \$1,735.26, payable in two years; to James Simpson, one for \$1,590.66, in one year, and one for \$1,735.26, in two years, and one for \$550, payable to his own order, in one year, and indorsed in blank by him.

To secure the payment, Montgomery conveyed by deed of the same date the lands to James G. Barbour, in trust, that should default be made in the payment of any of the notes at maturity, to sell the same at auction, for cash, and to pay and

satisfy the notes, not only such as should be due, but those not due, discounting the latter at the rate of six per cent per annum. Both deeds were acknowledged and recorded, but the commissioner of deeds, before whom the latter was acknowledged in the city of Memphis, being also a commissioner of deeds for the state of Mississippi, through inadvertence and mistake, described himself in his certificate of acknowledgment as "commissioner of deeds for the state of Mississippi," appointed as such by the governor of that state. On the nineteenth day of November, 1860, and after the latter deed had been admitted to record, Montgomery sold and conveyed an undivided third part of the lands to Newton Ford, who, on the tenth day of December following, sold and conveyed the same back to Montgomery, and on the same day Montgomery sold and conveyed the whole to Robert B. Alexander. Montgomery's deed to Alexander also acknowledged the receipt of the purchase-money; and Alexander, when he purchased, had notice of the mistake in the certificate, and all the above-mentioned facts.

All the notes having matured, and being unpaid, Barbour, at the request of the holders, proceeded to execute the trust; and after giving notice of the sale as prescribed in the deed, on the sixteenth day of January, 1866, sold the lands at auction, and James G. Simpson, the complainant, became the purchaser at the sum of four thousand dollars, and under power and authority given by the deed, Barbour executed a deed of conveyance of them to him.

This deed, like the other, recited the payment of the money, but none was actually paid to the trustee; Park and Simpson, the holders of the notes, except the one for \$550, crediting the amount of the bid on the notes, and agreeing with the complainant, on account of doubt and uncertainty about the title, not to exact the money from him unless it should prove good and indefeasible.

After the sale by the trustee, and after his deed to the complainant had been duly recorded, Josiah D. Williams filed a bill in the Crittenden circuit court to subject the lands to an alleged lien for the payment of a note for \$1,650 which Alexander had given Montgomery for a part of the purchase-money in the sale to him, and which he held as assignee. No defense being made to his suit, a decree was rendered according to the prayer of his bill, and the lands were sold, and bought by him for the amount of the decree, and a deed was made him under the authority of the court.

Complainant's bill further charged that the lands were wild and unimproved, and not in the actual occupancy or possession of any one; that Williams set up and claimed title to said lands under his purchase; that his claim, and the circumstances before stated, had cast a cloud upon complainant's title; and it prayed that his equities in the lands might be established, and his title to the same cleared from the cloud and quieted; and that, if that relief could not be afforded him, he be relieved from the payment of the money he owed William Park and James Simpson.

Montgomery and his wife, Williams and wife, and Alexander filed a demurrer; the other defendants made no defense. The court sustained the demurrer, and dismissed the bill, and the complainant appealed.

The mere assignment of a note given for the purchase-money of land, which the vendor has conveyed by deed to the vendee, does not transfer or carry with it the lien of the vendor for the payment of the purchase-money: *Shall v. Biscoe*, 18 Ark. 142; *Williams v. Christian*, 23 Id. 255; *Crawley v. Biggs*, 23 Id. 563. Williams therefore acquired no lien by the assignment of Alexander's note to him; and however conclusive his decree may be against Montgomery and Alexander, who were parties to the suit, but made no defense, the rights of the complainant, who was not a party, are not in the least affected by it, or any proceeding under it: 1 Story's Eq. Jur., sec. 407; Story's Eq. Pl., sec. 72; *Trammell v. Thurmond*, 17 Ark. 203; *Hannah v. Carrington*, 18 Id. 85; 1 Greenl. Ev., secs. 522, 523.

The only evidence upon which a deed can be admitted to record is the certificate of proof, or acknowledgment of a court or officer authorized by the statute to take such proof and acknowledgment: Dig., secs. 12-16, 22, 33, 34, c. 37; *Jacoway v. Gault*, 20 Ark. 190; *Biscoe v. Byrd*, 15 Id. 655; *Blagg v. Hunter*, 15 Id. 246; *Trammell v. Thurmond*, 17 Id. 203; *Hester v. Fortner*, 2 Binn. 40; *Johnson v. Hains*, 2 Ohio, 25 [25 Am. Dec. 533].

As no such certificate accompanied the deed of trust, it was not properly admitted to record, and consequently did not become constructive notice to the world. No question could possibly have arisen had it been duly recorded; and as the mistake of the commissioner of deeds who took the acknowledgment was the sole cause of the omission, the whole controversy rests upon that point.

To correct and relieve against mistakes and accidents is one of the principal objects and most ordinary duties of courts of equity. Judge Story, speaking of the jurisdiction of courts of equity arising from accidents, says: "By the term 'accident' is here intended not merely inevitable casualty, or the act of Providence, or what is technically called *vis major*, or irresistible force, but such unforeseen events, misfortunes, losses, acts, or omissions as are not the result of any negligence or misconduct in the party."

Lord Cowper, speaking on the subject of accident as cognizable in equity, said: "By accident is meant when a case is distinguished from others of the like nature by unusual circumstances,"—a definition quite too loose and inaccurate without some further qualifications; for it is entirely consistent with the language that the unusual circumstances may have resulted from the party's own gross negligence, folly, or rashness: 1 Story's Eq. Jur., sec. 78. Again, in speaking of the jurisdiction founded upon the ground of mistake, he says: "This is sometimes the result of accident, in its large sense; but as contradistinguished from it is some unintentional act, or omission, or error, arising from ignorance, surprise, imposture, or misplaced confidence": 1 Id., sec. 110. In the case before the court, neither the *cestui que trust* nor the trustee can be charged with any negligence or misconduct. The mistake was not theirs, and they had no agency in producing it. It was evidently a clerical error, and a very unusual one, the probability of which was not likely to occur to the mind of any one, of such a character as not readily to be discovered, and was made by an officer, in the performance of his duty, in whose skill and correctness they had a right to confide.

That relief is afforded in cases of mistake such as this is shown by the following remarks of the author just quoted: "In like manner, as equity will grant relief in cases of mistake in written instruments, to prevent manifest injustice and wrong, and to suppress fraud, it will also grant relief and supply defects where, by mistake, the parties have omitted any acts or circumstance necessary to give due validity and effect to written instruments. Thus equity will supply any defect of circumstances in conveyances occasioned by mistake; as of livery of seisin in the passing of a freehold, or of a surrender in case of a copyhold, or the like; so also misprisions and omissions in deeds, awards, and other solemn instruments, whereby they are defective at law": 1 Story's Eq. Jur., sec. 11, p. 166.

And this relief is not only afforded against original parties, but also against those claiming under them, as heirs, devisees, judgment creditors, or purchasers from them, with notice of the facts: 1 Story's Eq. Jur., sec. 165; *Simmons v. North*, 3 Smedes & M. 67; *Gouverneur v. Titus*, 6 Paige, 347.

No notice, however, to Ford of the mistake is charged in the bill, and it is to be presumed that he was a *bona fide* purchaser without notice; but the superior equity he acquired as an innocent purchaser was not transmitted to Montgomery by the reconveyance to him, and from him to Alexander and Williams in succession; but the same equities his vendor had when he sold to Ford reattached upon the property when conveyed back to him: 1 Story's Eq. Jur., sec. 410; *Schult v. Large*, 6 Barb. 373; 2 Lead. Cas. Eq. 184; *Kennedy v. Daly*, 1 Schoales & L. 379.

Montgomery being a party to the deed of trust, and Alexander purchasing with notice of the mistake in the commissioner's certificate, by which the deed of trust was prevented from being duly recorded, and Williams, with notice of complainant's title, it is evident that complainant's equity is superior to that of either; and the equitable being united with the legal title in him, his title to the lands in controversy is absolute and indefeasible.

But it is objected, because the complainant did not pay the money, and William Park and James Simpson agreed with him not to exact it of him, unless his title should prove to be good and indefeasible, that his purchase of the lands was champertous, and he has no right to maintain a suit respecting them. We are unable to perceive a single feature of champerty or anything unlawful, immoral, or against public policy in the transaction. The lands were not sold by these parties, but by Barbour, the trustee appointed by Montgomery, at auction, where any person was at liberty to bid and might have become the purchaser, in the execution of the trust, and with no view or purpose of bringing or carrying on a suit; and the sum at which they were bid off was placed as a credit on the notes, and the end of the sale as fully accomplished as if the money had been paid to the trustee, and then paid over by him to the holders: *Goodwin v. Floyd*, 10 Yerg. 520.

The court below erred in sustaining the demurrer to the bill, and in dismissing the same. Its decree is therefore reversed, and said demurrer is overruled, and the case remanded for further proceedings.

ASSIGNMENT OF NOTE FOR PURCHASE-MONEY for land, whether carries with it vendor's lien: *Perry v. Roberts*, 95 Am. Dec. 689, and note 690

DEED IS NOT ENTITLED TO BE RECORDED, unless executed and acknowledged according to law; unless this is done, it is not constructive notice: *Ely v. Wilcox*, 91 Am. Dec. 436, and note 441.

CORRECTION OF MISTAKE IN ACKNOWLEDGMENT OF DEEDS: *Jordan v. Corey*, 52 Am. Dec. 517, and extended note 519, citing the principal case.

CHAMPERTY, LAW OF: *Thallmer v. Brinckerhoff*, 15 Am. Dec. 306, and note 317.

GALBREATH, STEWART, & Co. v. DAVIDSON.

[25 ARKANSAS, 490.]

MECHANIC'S LIEN CANNOT BE ENFORCED when the contract under which it arises is made with another than the ostensible owner of the property at the time, and without his consent or authority.

IT IS ERROR TO INSTRUCT THAT FINDING ONE ISSUE in favor of plaintiff will entitle him to recover, when, in order to gain the suit, all of the issues must be found in his favor.

WHARF-BOAT IS LIABLE FOR MECHANIC'S LIEN, as it is attached to the soil, and savors of the realty.

THE opinion states the facts.

Watkins and Rose, for the plaintiffs in error.

Pindalls and English, and *Gantt and English*, for the defendant in error.

By Court, GREGG, J. On the third day of June, 1868, Davidson filed, in the office of the clerk of the circuit court of Desha County, his account for \$1,048.78, and claimed a mechanic's lien for that sum for materials, work, and labor, in repairing a wharf-boat, under a contract with Loftin H. Nunn. On the 25th of September he sued out a *scire facias* to enforce such lien, which was served on Nunn, and returned to the October term, 1868, of the court, at which time Galbreath, Stewart, & Co. appeared, claimed the boat, were made defendants, and filed three pleas.

The pleas were in substance, —

1. That Galbreath, Stewart, & Co. were the owners of the boat, but that at the date of the repairs, etc., A. S. Dowd was owner; that the contract was made, repairs done, etc., without any authority from Dowd.

2. That when said work was had and done, Galbreath, Stewart, & Co. were the true and ostensible owners of the boat, and that they are still such owners, and that such labor, etc.,

was had and done, and the contract therefor made, without any authority from them.

3. That Nunn did not undertake and promise as alleged, etc.

Davidson took issue upon the first and third pleas, and demurred to the second. The court sustained the demurrer; Galbreath, Stewart, & Co. rested; a jury was called, and trial had upon the issues to the first and third pleas; verdict and judgment had in favor of Davidson for the amount of his claim. Galbreath, Stewart, & Co. excepted to the giving of the first, second, and third instructions for Davidson, and the refusing to give the first, second, third, and sixth instructions asked by them. They moved for a new trial; their motion was overruled; they excepted thereto, and took their bill of exceptions, setting out all the evidence, and brought error.

The first error complained of was the sustaining the demurrer to their second plea. We see no valid objection to that plea; if Galbreath, Stewart, & Co. were the owners of the boat, really and ostensibly, as averred, thus openly exhibiting their title, and gave no authority for such repairs, they are not liable therefor; and one who would attempt to make gain by meddling with their property, thus openly or "ostensibly" held, without their direct or indirect consent, would of course lose any labor or material he might so expend. But the evidence now before the court shows most clearly that such were not the facts; that if Galbreath, Stewart, & Co. were the owners, they were secretly so. In no sense were they ostensible owners. They made no record or other public evidence of their title; they exercised no control over the boat; made no claim to it, or the rents and profits from it; and Nunn, who had entire charge of the boat, had no knowledge of any such ownership or claim. Yet they had a right to aver such facts, and if they can sufficiently prove their title and non-consent, the defense will be a good one.

In giving the instructions for Davidson, the court seemed to misapprehend the law arising upon the issues to the separate pleas of Galbreath, Stewart, & Co., and instructed the jury on each issue, that if they found that issue in favor of Davidson, they must assess his damages, etc., to the effect, that if either issue was found for the plaintiff, he must recover, when evidently the judgment would have been for the defendants therein, if any one of the issues had been found for them. One good plea, sufficiently proved, will defeat an action. These instructions were substantially good, but for this error.

The third and last ground assigned as error is the refusal of the court to give the first, second, third, and sixth instructions of Galbreath, Stewart, & Co., which instructions in effect required the court to declare a wharf-boat personal property, and not subject to a mechanic's statutory lien. The statute declares that all artisans, builders, and mechanics who shall perform work, etc., on any building, edifice, or tenement for the owner or proprietor, etc., shall have an absolute lien on such building, edifice, or tenement for such work and labor, as well as for all materials furnished, etc., and for all sums of money paid on account of materials furnished and used about such work, etc.: See Gould's Dig. 768.

While it is true that this is a statutory proceeding, and cannot be construed to apply remedies beyond the declared intent and meaning of the legislature, a large majority of the state courts have holden that such are meritorious remedial laws, and should have a liberal interpretation. They should be so construed as not to defeat the spirit, true intent, and meaning of the acts, and that such laws have been wisely enacted to encourage valuable and permanent improvements, and to secure the industrious mechanic his reasonable reward: See *Patrick v. Valentine*, 22 Mo. 148; *Barnes v. Thompson*, 2 Swan, 315; *Tuttle v. Montford*, 7 Cal. 360; S. C., 2 Cal. 60; *Buck v. Brian*, 2 How. (Miss.) 88; *Houck on Liens*, 38, and cases there cited.

Such laws were not intended to create liens upon mere personal chattels, but upon lands or things in some manner attached to the realty; not to embarrass commerce, or hinder the ready exchange of purely personal property, but to secure the erection of valuable structures, and protect the interests of him who may furnish materials and build the same.

The application of the law in this case is not entirely free from difficulty. Is a wharf-boat a mere personal chattel, or does it savor of the realty? Is it so attached to the soil as to support such lien? We are of the opinion that it is.

When the term "boat" is used, we are likely to catch the idea of locomotion,—of passing, or transportation from one point to another,—without hesitating to inquire whether that term is ever applied to other structures, which have no power of locomotion, no propelling force, by which they can move or be moved from point to point. It may be said the fastenings are easily cut, and a wharf-boat can be readily towed or floated away. So may a house be placed on rollers, and speedily

hauled upon other lands, but no one doubts a house being a fixture, simply because it is capable of being removed.

The riparian owner has a just claim to all the soil composing the bank of a stream, and no one can hold or use such soil upon the margin of a river, whether navigable or not, for the purpose of fastening or making safe any structure or building against the will of such owner; and should any one attempt to so lodge such building upon the private soil of another, forcibly and against his consent, we suppose no attorney would deny but such a one might be ejected therefrom.

The location and maintaining of a wharf-boat must depend upon its attachments to the soil. Such boat or building has no power to retain its position, except its bank fastenings. It cannot be severed from the soil without destroying the structure, at least its present local utility. Cut such structure loose from its moorings, — from its connections, — and it is as effectually ruined for all practical purposes as is a house rolled away from its business location. To this extent it appertains to the realty. It rests against the bank. It supports upon the realty, and, unlike vessels that "plow the waters," it has no mobility — no apparatus to change place, or power to retain position — other than land fastenings. It is in fact but a floating business house, or rather a business house upon the surface of the water, and stationed by its cables. It is a building, — a structure commonly used to facilitate the landing of boats, and the storing of freight, and it may have sleeping-apartments, may be dwelt in, and it is embraced within the spirit and meaning of our statute declaring that such liens may be held on "any building, edifice, or tenement": Gould's Dig., sec. 1, p. 768. Hence, we are of opinion that the court below did not err in refusing to give the first, second, third, and sixth instructions asked by Galbreath, Stewart, & Co.

But, for the errors aforesaid, the judgment must be reversed, and the cause remanded for further proceedings, not inconsistent with this opinion.

BOATS, DOCKS, AND WHARVES, MECHANIC'S LIEN may exist against, if they are attached to the soil, and savor of the realty: Note to *La Crosse etc. R. Co. v. Vanderpool*, 78 Am. Dec. 695.

THE PRINCIPAL CASE IS CITED in *Cotton v. Penzel*, 44 Ark. 485, to the point that the materials furnished must become in some way a part of the land in the form of a building, or other erection, before a mechanic's lien can be asserted, and it is also necessary that the person for whom the erection is made should have some estate in the land.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

BREWSTER v. HARTLEY.

[37 CALIFORNIA, 15.]

CHAPTER 1 OF ACT OF 1850, CONCERNING CORPORATIONS, WAS NOT REPEALED by the act of 1851, although by a typographical error in the statutes of 1851, page 443, section 31, as printed, the whole of that act appears to have been repealed. The act, as enrolled, shows that only chapter 3 of the act of 1850 was repealed.

AUTHORITY TO HEAR AND DETERMINE ACTIONS AND PROCEEDINGS AT CHAMBERS may be conferred upon judges by the legislature.

APPEAL MAY BE TAKEN FROM JUDGMENT RENDERED BY JUDGE AT CHAMBERS in a special proceeding to try the validity of a corporate election.

WHERE ATTORNEYS STIPULATE WHAT ARE FACTS IN CASE, agreeing that the stipulation shall form part of the judgment roll, and that no other statement on appeal shall be necessary, the facts therein recited stand in the place of a finding of the facts by the court, no statement on appeal is necessary, and no specification of the errors relied upon need be made in the record.

WHERE EXERCISE OF CORPORATE POWER HAS BEEN REGULATED BY STATUTE, the corporation cannot, by its by-laws, resolutions, or contracts, change the mode of the exercise of that power.

WHERE STATUTE EXPRESSLY DECLARES WHO SHALL BE ENTITLED TO VOTE FOR DIRECTORS of a corporation, the corporation has no authority to extend or limit the right as regulated by the statute.

WHERE STATUTE GIVES STOCKHOLDERS OF RAILROAD CORPORATION POWER TO ELECT ITS DIRECTORS, the corporation cannot deprive the stockholders of this power.

WHERE CORPORATION INDEBTED TO ONE PERSON ISSUES TO ANOTHER AS TRUSTEE, as security for the debt, shares of its capital stock to be re-transferred to the corporation upon payment of the indebtedness, the transaction constitutes a pledge of the stock. The general property in the stock in such a case is in the pledgor, the corporation.

WHERE CERTIFICATE BOOK OF CORPORATION SHOWS THAT STOCK IS HELD BY PERSON AS TRUSTEE, the officers of the corporation are charged with

notice that he does not hold the stock in his own right. Such officers are charged with notice of a contract to which the corporation is a party.

STOCK OWNED BY CORPORATION CANNOT BE VOTED, although held by a trustee.

IF CASE BE SUBMITTED UPON STIPULATED FACTS WITHOUT RESERVING QUESTION OF COMPETENCY, relevancy, or admissibility of any fact in the statement, the question cannot be raised in the appellate court that such facts are not properly before the court.

RAILROAD CORPORATION CANNOT ISSUE CERTIFICATES OF STOCK until they are fully paid for.

CERTIFICATES OF STOCK OF CORPORATION ISSUED TO CREDITOR THEREOF, as a pledge to secure his debt, are illegally issued, and cannot be voted by any person.

APPEAL from an order or judgment in a summary proceeding, to set aside an election of directors of a railway corporation, brought under section 15 of chapter 1 of the act of 1850 concerning corporations. In 1862, a corporation called the Placerville and Sacramento Valley Railroad Company was formed. On August 21, 1865, the corporation was indebted to Wells, Fargo, & Co. in the sum of two hundred and sixty-eight thousand dollars, for money advanced. On that day the corporation passed a resolution that ten thousand shares of its capital stock be issued to Louis McLane, as trustee for Wells, Fargo, & Co., as security for moneys advanced to said company by Wells, Fargo, & Co., with authority to vote the same at all meetings of the stockholders, provided that McLane should enter into a written agreement to retransfer the said stock to said company on payment of said indebtedness to Wells, Fargo, & Co., and in proportional amount as said payments should be made. On the same day the ten thousand shares of stock were issued to McLane, and a certificate of stock delivered to him, and receipted for on the books of the company, in these words: "Received the above certificate, subject to the articles of incorporation and by-laws of the company. Louis McLane, trustee. *Per* Theo. F. Tracy." On the 3d of October, 1865, McLane entered into a written agreement, which was filed in the office of the corporation, in which he accepted the trust, and agreed to retransfer the stock upon payment of the indebtedness to Wells, Fargo, & Co. The certificate book of the corporation contained this entry: "Louis McLane, trustee, ten thousand shares." At an election for directors, held on February 4, 1868, of the whole number of votes cast, each of the defendants, namely, H. H. Hartley, George W. Swan, John Blair, James Blair, Truman Wilcox,

F. A. Bishop, G. G. Clark, William C. Wilkinson, and S. D. Brewster, received 10,512; 10,000 of which were cast by Louis McLane, by his proxy, Charles E. McLane; and 3,098 votes were cast for each of the plaintiffs, namely, C. W. Brewster, W. S. Burns, F. A. Bee, A. T. Melvin, L. Landecker, R. B. McBride, J. G. McCallum, W. H. Cooper, and O. H. Burnham. All the votes cast were admitted to be legal, except those cast by Louis McLane. At the time these votes were cast they were objected to, and a protest against their being cast was made by all the stockholders who voted for the plaintiffs. The defendants were declared to be elected, and the plaintiffs then and there protested. The plaintiffs, before commencing this proceeding, demanded the possession of the offices, books, and other property of the said offices, which the defendants refused to deliver. The whole number of shares of the capital stock of the corporation was 15,000, of which 14,674 shares had been issued, if said 10,000 were counted, or 4,674, if the disputed shares were not counted. The case was submitted in the supreme court upon the following stipulation: "It is hereby stipulated that the foregoing complaint, stipulations, and judgment contain a correct statement on appeal, and that this is a true transcript of the same, being the judgment roll in said cause." The transcript on appeal contained the complaint, a stipulation that the allegations of the complaint should be deemed denied without an answer, the agreed facts, and the above stipulation as to the transcript. There was no assignment of errors or statement of the grounds upon which a reversal of the judgment was sought, in the transcript. The case was submitted to the judge below, and by him decided at chambers. He adjudged the defendants properly elected directors, and the plaintiffs appealed.

J. G. McCallum, for the appellants.

H. and C. McAllister, for the respondents.

By Court, RHODES, J. 1. The point that the proceeding is without authority of law is based upon a typographical error in the statutes of 1851, page 443, section 31. It appears from that section, as printed, that the whole act of 1850, concerning corporations, was repealed; but the act, as enrolled, shows that only chapter 3 of the act of 1850 was repealed. Chapter 1 of that act, which includes the section under which the proceeding was instituted, was left in full force.

2. The proceeding is clearly of a judicial character. The controversy was heard and determined by the judge in his official capacity, and his decision was a final determination of the rights of the parties to the proceeding. The fact that the proceeding was instituted before the judge, and not the district court, does not prove that the proceeding was not a judicial proceeding, nor that the decision does not amount to a judgment, for the legislature is not prohibited by the constitution from conferring upon the judges authority to hear and determine actions and proceedings at chambers. Such authority is granted in respect to writs of *mandamus*, *certiorari*, and *quo warranto*. We are of the opinion that this is a special proceeding; that the decision is a judgment, and that an appeal therefrom is given by section 347 of the Practice Act; and such, we judge from the stipulation, was the view of the counsel who appeared before the district judge.

3. The parties recited in their stipulation all the facts in the case, and agreed that the stipulation should be a part of the judgment roll, and that no other statement on appeal should be required. The facts therein recited took the place and served all the purposes of a finding of facts by the court. No statement on appeal was necessary. All the questions presented arise upon what the parties have agreed shall constitute the judgment roll, and no specification of the errors or ground relied upon is required to be made in the record.

4. The power of electing the directors of a railroad corporation is lodged by the statute in the hands of the stockholders. The exercise of this power having been regulated by the statute, the corporation cannot, by its by-laws, resolutions, or contracts, either give or take it away. Were the statute silent in this respect, the election of the directors, like the election or appointment of subordinate officers, would be subject to the regulation and control of the corporation; but the statute having expressly declared who shall be entitled to vote for directors, its provisions are imperative upon the corporation, constituting a part of the law of its being; and the corporation has no authority to extend or limit the right as regulated by the statute. The first section of the act of 1861 (Stats. 1861, p. 607) provides that the first board of directors shall be elected by the subscribers to the stock, and subsequent sections provide that after the first election the directors shall be elected by the stockholders,—each stockholder being entitled to one vote for each share of stock which he owned for

ten days next preceding such election. The clause, therefore, of the resolution of the board of directors giving Louis McLane authority to vote the stock transferred to him by the corporation, as well as the clause to the same effect in the agreement entered into by him with the corporation, was void.

It becomes necessary to ascertain the ownership of the stock voted upon by McLane. For this purpose the resolution of the board of directors, the receipt given for the stock, and the agreement executed by McLane, are to be construed together as constituting one transaction. The substance of the transaction is, that Wells, Fargo, & Co. advanced to the Placerville and Sacramento Valley Railroad Company the sum of two hundred and sixty-eight thousand dollars, and the railroad company, as security for the money so advanced, issued to Louis McLane, as the trustee for Wells, Fargo, & Co., ten thousand shares of the capital stock of the railroad company, to be retransferred to the company upon payment of the indebtedness for the money so advanced, and in proportional amounts as said payments should be made. The time of payment is not specified. The respondents contend that the transaction is neither a mortgage nor a pledge of the stock, but only amounts to a trust; and the appellants claim that the transaction constitutes a pledge. We are of the opinion that it is a pledge.

A pledge is a bailment of personal property as a security for some debt or engagement: Story on Bailments, sec. 268. The general property in the thing pledged remains in the pledgor, and only a special property vests in the pledgee. A delivery to the pledgee of the thing pledged is essential to the contract; and until that act is performed, the special property that the bailee is entitled to hold does not vest in him. In respect to most kinds of property, a delivery of the property to the pledgee, without any written transfer of the title, is sufficient to pass the requisite special property. Incorporeal property, being incapable of manual delivery, cannot be pledged without a written transfer of the title. Debts, negotiable instruments, stocks in incorporated companies, and choses in action generally, are pledged in that mode. Such transfer of the title performs the same office that the delivery of possession does in case of a pledge of corporeal property. The transfer of the title, like the delivery of possession, constitutes the evidence of the pledgee's right of property in the thing pledged. The transfer in writing of shares of stock not only does not prove

that the transaction is not a pledge, but the stock, unless it is expressly made assignable by the delivery of the certificates, cannot be pledged in any other manner. In *Wilson v. Little*, 2 N. Y. 443 [51 Am. Dec. 307], the stock was transferred to the defendants, but the court held that the contract amounted to a pledge of the stock. See also *Jewitt v. Warren*, 12 Mass. 300 [7 Am. Dec. 74]; *Bowman v. Wood*, 15 Id. 534; *Dewey v. Bowman*, 8 Cal. 145; Story on Bailments, secs. 290 et seq.; Parsons on Contracts, 595. In *Dewey v. Bowman*, *supra*, it is said that the pledgee has not the legal title to the property, and language of the same import is found in many cases. It was not intended to say in that case that the pledgee never receives the apparent legal title, but only that, as between him and the pledgor, the title, or more accurately the general property, remained in the pledgor, for the subject-matter of the contract was a lease which was assigned to secure the payment of a certain promissory note, and it was held that the contract was a pledge, and not a mortgage. In *Wilson v. Little*, *supra*, in speaking of the pledge of certain shares of stock, the court say: "The general property which the pledgor is said to retain is nothing more than a legal right to the restoration of the thing pledged, on payment of the debt." A corporation, in pledging shares of its stock, which had not been issued at the time of making the contract, must, of necessity, issue them to the pledgee, or to some one for him.

The circumstance that the stock was issued to Louis McLane, as trustee for Wells, Fargo, & Co., instead of being issued in the name of the latter, does not alter the real nature of the transaction. McLane is described as the trustee of Wells, Fargo, & Co., but his position and duties in respect to the stock, so far as either of the parties to the contract are concerned, is that of agent of the creditors. He is none the less a mere agent in the transaction because he is described as trustee. The transfer of the stock to him was in law a transfer to his principal, Wells, Fargo, & Co. Had he been named as the agent of the creditors, there would be no room for doubt on this point. His true position in the transaction is to be determined, not by the title given to him, but by the acts and duties he is to perform; and these show that he bears the relation of agent to the creditors of the corporation.

The transaction lacks one essential element of a mortgage. A mortgage passes the title to the mortgagee, the mortgagor reserving the right to defeat the transfer and revest the title in

himself by the performance of an express condition subsequent. Here no time was mentioned for the repayment of the money advanced, and the contract looked to the retransfer of the stock to the corporation. It is not claimed on the part of respondents that McLane had any right to sell the stock, but it is admitted that he is to hold it until the money, or some part of it, is paid, and thereupon to retransfer the stock, or a proportional part of it, to the company. No other right in the stock is asserted for Wells, Fargo, & Co. than that claimed for McLane. This evidently is not such a title as is held by a mortgagee of personal property. We are satisfied that the contract is a bailment of the stock, and we are unable to give it any place among the different kinds of bailment except that of a pledge.

It results from this view of the contract that, as between the parties, the general property in the stock is in the pledgor, — that the railroad company is its owner.

5. The question here is not whether the pledgee or a trustee to whom stock has been pledged or transferred by a stockholder, and who appears upon the books of the corporation to be the owner, is entitled to vote, but it is whether the agent or trustee of the pledgee, who is described in the certificate book of the corporation as a trustee, and who holds, as such trustee or agent, certain shares of stock which were pledged by the corporation to its creditor, is entitled to vote such stock. The designation of McLane as trustee was sufficient to show that he did not hold the stock in his own right, and as the corporation was one of the parties to the contract, its officers are chargeable with notice of the manner in which he held the stock. The case falls within the principle of *Ex parte Holmes*, 5 Cow. 426, in which it was held that there could be no vote upon stock owned by the company, though held by trustees; that it was not stock to be voted upon by any one within the meaning of the charter or the general act relating to that subject. Subsequent cases, like *Ex parte Barker*, 6 Wend. 510, though qualifying and restricting the broad language of *Ex parte Holmes*, *supra*, so as not to exclude the vote of a trustee upon the stock held in trust for a stockholder, have not questioned the doctrine that the stock belonging to the corporation, though held in the name of trustees, was not entitled to be voted upon. This doctrine must command the assent of every one, unless it can be shown that a corporation can become a stockholder in the sense of the statute of its own stock, receiving from itself dividends, and responding to

itself for calls for assessments, and being responsible for the debts of the corporation, first as a corporation, and second, as a stockholder.

6. It is objected that an investigation cannot be here collaterally made of the terms and conditions upon which the trustee holds the stock. To what extent evidence, if objected to, would be admissible to prove such terms and conditions, it is unnecessary to inquire, for the case was presented to the court below upon an agreed statement of facts, without reserving the question of the competency, relevancy, or admissibility of any fact in the statement, and it is now too late to raise the question. The judgment of the court was invoked upon the facts recited in the statement.

7. There is another view of the matter which appears to us to be equally decisive of the case. The whole act proceeds on the theory that the certificates of stock are to be issued only upon the payment in full for the stock. Section 14 is as follows: "Certificates of stock shall be issued, signed by the president and secretary, in such manner as may be prescribed by the by-laws of the company, for all stock paid up, from time to time, in compliance with the requirements of such directors, or that may be fully paid in advance of such requirements by the voluntary act of any stockholder of such company." This provision clearly negatives by implication the right to issue the certificates of stock in advance of payment. There are many provisions of the act that lend support to this construction. The book of stockholders is required to contain the amount of cash actually paid to the company by the stockholders respectively for their stock. In the next section (12) it is provided that the stock shall be transferable in the manner provided by the preceding section, and upon the books of the company, upon proper assignment and delivery to the assignee of the receipts for the installments paid on such stock, or the certificates of stock, when fully paid. The provision of the act is generally that all stockholders shall be liable to calls for assessments until the stock is paid up, and that payment may be enforced by suit and sale of the stock. The act also authorizes the holders of the railroad bonds, with the consent of the corporation, to convert the principal into stock,—that is, dollar for dollar. The manifest purpose was to place all stockholders upon an equal footing. The act is not liable to the charge of inequality, if not absurdity, of restricting the corporation so that it

could not issue the certificates of stock to the original subscribers to the stock, without payment in full, and permitting it to issue the remainder of the capital stock without payment.

Counsel have discussed the question whether the corporation can issue stock except in pursuance of a subscription; but that is not the question now before us, nor does it afford a test for its solution. It may be conceded that the corporation may issue its stock to its creditor in satisfaction of its debt, and the creditor may not be technically a subscriber to the stock, though he is substantially. In such case the creditor does that which is a prerequisite in every issue of stock,—he purchases and pays for the stock. His demand stands in the place of so much money.

The provision of section 13, that the directors may “call in and demand from the stockholders the sums by them subscribed, in equal installments of not more than ten per cent per month, unless otherwise stipulated in the articles of subscription, at such time as they may deem proper,” instead of lending support to the respondents’ position, that the stock may be issued without payment therefor, implies that payment must be made, and that the calls may be greater than ten per cent per month when the subscribers have so stipulated. The authority given in section 4 to the directors, to open books of subscription upon such terms as they may direct, does not permit them to receive subscriptions without any terms,—that is, without payment or promise of payment for the stock. And neither this provision, nor that of section 9, which is also relied on by the respondents, and which gives the directors power “to make and execute contracts of whatsoever nature or kind, fully and completely to carry out the objects and purposes of such corporation,” abrogates the special provisions relative to the issuing of the stock. In *Clark v. Farrington*, 11 Wis. 325, *Cincinnati etc. R. R. v. Clarkson*, 7 Ind. 595, *Carr v. Le Fevre*, 27 Pa. St. 413, and other cases cited by the respondents, the question was considered whether the company could receive anything but money on the subscription for stock; but if the position is tenable that the stock might have been issued without payment in anything, we are confident that it would have been taken in some of those cases, and the discussion of that question would have been useless.

While the position that the corporation may issue its stock

in payment of its indebtedness is not questioned, it does not follow that the stock may be issued to secure such indebtedness. Had the stock been issued in the usual manner, and afterwards become the property of the corporation, and been held in such a manner that it did not merge, the corporation might deal with it the same as any stockholder, unless prohibited by the statute; but the claim of authority to pledge the unissued stock necessarily assumes the very point in controversy,—the authority to issue the stock without purchase or payment.

The capital stock of a corporation, previous to its being issued, cannot, in any proper sense, be called the property of the corporation. When the certificates of stock are issued to a stockholder, they are, in his hands, the muniments and evidence of his title to a given share in the property, income, and franchises of the corporation: *Mechanics' Bank v. New York etc. R. R. Co.*, 13 N. Y. 627. The corporation possesses only the right, the power to issue the stock, and a condition precedent to the exercise of the power is the purchase and payment for the stock. This restriction, if it may properly be so called, is not more unreasonable than those relating to the amount of money the corporation may borrow, and the rate of interest it may pay, and they all tend in some degree to protect the stockholders and creditors. If the power exists in the corporation to issue stock to secure a loan or indebtedness, it is practically unlimited, and the directors may issue and pledge all the capital stock not held by stockholders as security for a trifling loan, and by the aid of the stocks thus issued they may increase the capital stock, and pledge the new stock to secure another loan, and thus perpetuate themselves in power beyond the reach of redress on the part of the stockholders, who may have contributed much the larger portion of the assets of the corporation.

We are of the opinion that the shares of stock issued to McLane to secure the payment of the money advanced to the corporation were illegally issued, and were not entitled to be voted upon at the election for directors, and that the plaintiffs received a majority of the legal votes cast at the election.

Judgment reversed; and it is further ordered and adjudged that, at the election held on the fifth day of February, A. D. 1868, by the stockholders of the Placerville and Sacramento Valley Railroad Company, for the election of directors of said corporation, C. W. Brewster, W. S. Burns, F. A. Bee, A. T.

Melvin, R. Landecker, R. B. McBride, J. G. McCallum, W. H. Cooper, and O. H. Burnham, were duly elected directors of said corporation.

CROCKETT, J., specially concurred in the judgment and opinion that the stock held by the trustee did not entitle him to vote at the election of directors. But he expressed no opinion as to the validity of the stock in the hands of the trustee as a security for the debt to Wells, Fargo, & Co.

SPRAGUE, J., concurred in the judgment.

SANDERSON, J., being disqualified, did not sit.

SAWYER, O. J., concurring specially, delivered an opinion, in which, after stating the nature of the proceeding, and quoting the section of the act under which it was brought, he said that he could see no answer to the objection made by the respondents that no appeal was authorized, and that this court had no jurisdiction to entertain the appeal. The proceeding was not had under the practice act, and its provisions are inapplicable. The proceeding authorized was special and summary, had before the judge as such, and not before the court. The object, doubtless, was to give a speedy remedy in a perfectly clear case at once before the judge. But in a case of great gravity or difficulty, he was permitted to direct the district attorney to exhibit an information in the nature of a *quo warranto*, and to require the proceeding to be had in the regular mode provided in the practice act. So far as the special and summary proceedings under the section are concerned, he thought the parties were limited to the remedy as there given. To his mind, it was clearly never contemplated that there would be an appeal. The proceeding was at chambers before the judge, and not a proceeding of the court as such. The fact that the papers were afterwards attached together and marked filed, and called a judgment roll by the clerk, did not change its character. The proceeding did not purport upon its face to be a court proceeding, and there was nothing authorizing it as a court proceeding. If the parties chose to adopt that mode of redress, he thought they must be content with the remedy afforded. He thought, therefore, that the appeal ought to be dismissed. But as his associates had disposed of the case upon other than jurisdictional grounds, he added that, whether the stock in question was regarded as an ordinary pledge, or as a trust, he concurred in the conclusion that McLane was not entitled to vote upon it, upon the grounds stated by Mr. Justice Rhodes, and upon the authorities cited by him.

RAILWAY COMPANIES MUST STAND UPON STRICT CONSTRUCTION of their chartered privileges: See *Martin v. Pensacola & Ga. R. R. Co.*, 73 Am. Dec. 713, note 723, where other cases are collected.

PLEGGED STOCK, WHO ENTITLED TO VOTE: See note to *Taylor v. Griswold*, 27 Am. Dec. 62.

THE PRINCIPAL CASE IS CITED in *Griswold v. Seligman*, 72 Mo. 122, to the point that a corporation cannot be its own stockholder.

SPENCER v. GEISSMAN.

[87 CALIFORNIA, 96.]

PARTY HAVING ACQUIRED HOMESTEAD RIGHT IN TRACT OF LAND, WHO IS EVICTED FROM PART THEREOF ON WHICH HE LIVED, MAY MOVE TO THE OTHER PART OF SUCH TRACT, AND HOLD IT AS A HOMESTEAD.

PARTY HAVING NAKED POSSESSION ONLY OF TRACT OF LAND MAY ACQUIRE HOMESTEAD RIGHT therein as to everybody but the true owner, and such homestead right is exempt from forced sale on execution, and cannot be affected, except by a voluntary conveyance, or relinquishment in the mode prescribed by the statute. And the fact that the claimant, after the attaching of his homestead right, acquires the true title from a stranger does not affect his right.

HOMESTEAD RIGHT DOES NOT DEPEND UPON CHARACTER OF TITLE held by the claimant thereof. The protection extends to whatever title he may have.

APPEAL. The opinion states the case.

F. E. Spencer, for the appellant.

Peckham and Payne, for the respondent.

By Court, SAWYER, C. J. This is an action to recover land in Santa Clara County. Defendant had judgment, and plaintiff appeals on the judgment roll, without any statement.

The plaintiff relies on title derived from the defendant through a sale under a judgment and execution against him. The following are the material facts as found by the court: Prior to April 26, 1861, defendant was in possession of a tract of land including the *locus in quo*, and he continued in possession of the premises in controversy till October, 1864, and till after the commencement of this action. The whole tract so in defendant's possession was included in one inclosure till after the recovery of a certain judgment by one Villagraña. On the 11th of October, 1864, said Villagraña recovered the judgment referred to against Geissman, defendant in this action, for the possession of a portion of said tract so possessed by said defendant, but not the portion now in controversy, and for costs. The judgment was docketed on the same day. On the 15th of October, 1864, a writ of possession, including an execution for costs, was issued to the sheriff, which was executed so far as to put the plaintiff in possession of the portion of the aforesaid tract recovered in that action, and returned with the certificate of the sheriff that no property could be found out of which he could make the costs. Prior to the entry of said judgment, the dwelling-house in which defendant lived, together with the outhouses appurtenant thereto, were on that

portion of said tract in the possession of defendant so recovered by Villagrafia, but defendant had another dwelling on that portion now in controversy, but not recovered by Villagrafia, which was occupied by men in his employ. On being turned out, under the writ, of that portion recovered by Villagrafia, defendant moved his family into said other house on said portion now in controversy, and he continued to reside there with his family until after the commencement of this action. On the 24th of April, 1861, the defendant, then being a married man and the head of a family, executed in due form, and caused to be duly recorded in the recorder's office of the proper county, a declaration, declaring the whole of said tract, including the portion now in controversy, and that subsequently thereto recovered by Villagrafia, to be his homestead, and no abandonment of homestead has ever been filed or recorded. Thus a part of the homestead, as originally established, was recovered by Villagrafia, and a part, being the part in controversy, remained unaffected by the recovery. On the 16th of November, 1864, another execution for costs was issued on the Villagrafia judgment. On the 28th of November, 1864, the sheriff levied said execution on the premises now in controversy. On the 24th of December, 1864, the sheriff, under said execution, sold all the interest of defendant to the plaintiff Spencer. The proper certificate of sale was given to the purchaser and filed in the proper recorder's office, and six months thereafter having expired without any redemption being made, the sheriff executed in favor of the purchaser the proper deed of conveyance, in pursuance of the sale and the statute in such case made and provided. The plaintiff relies for a recovery on the title thus acquired.

At the time of the filing of the declaration of homestead, as aforesaid, the title in fee was in a stranger; but the title was acquired by defendant before said sheriff's sale.

At the time the judgment was docketed and became a lien, the premises constituted the homestead of the defendant as to everybody except the owner of the land. There is no question made as to its being a homestead, if a party having a naked possession only—the title being in a stranger—can acquire a homestead right in the land so possessed. The statute does not specify the kind of title a party shall have in order to enable him to secure a homestead. It says nothing about title. The homestead right given by the statute is impressed on the land to the extent of the interest of the claimant in it,—not

on the title merely. The actual homestead, as against everybody who has not a better title, becomes impressed with the legal homestead right by taking the proceedings prescribed by the statute. The estate or interest of the occupant, be it more or less, thereby becomes exempt from forced sales on execution, and can only be affected by voluntary conveyances or relinquishment in the mode prescribed. The land in this instance, as to everybody having no superior title, became the homestead of the defendant, for all the purposes of protection against forced sales and voluntary conveyances in any other than the statutory mode, as effectually as if the defendant had held the title in fee-simple. There was nothing which the sheriff was authorized to sell under execution. The fact that the defendant, after the attaching of the homestead right, acquired the true title from a stranger, does not affect the question. This did not vitiate the homestead right which had attached to the land, and given an independent estate not subject to execution. The title so acquired cannot be considered as a thing separate and apart from the land subject to sale and conveyance in the hands of the homestead claimant, so as thereby to affect the homestead right. By filing the declaration, the party indicates his intention to make the land his homestead; and if he afterwards acquires an outstanding title, it attaches itself to the homestead already acquired, and perfects the homestead right. If it were otherwise, a homestead could not be secured which would be safe against forced sales, unless there was at the time a perfect title in fee-simple in the party who seeks the homestead right. In case of a title in any respect imperfect, the claimant could not perfect his title to his homestead, except at the risk of losing it altogether, through the intervention of a creditor, and by the very means adopted to render it more secure; and under such a construction of the statute, it would not be available to the greater portion of the class in this state, who need it most.

We think the district court correctly held that no title passed by virtue of the sheriff's sale and deed.

Judgment affirmed, and the *remittitur* directed to issue forthwith.

WHAT TITLE SUFFICIENT TO SUPPORT HOMESTEAD: See *Tomlin v. Hilgard*, 92 Am. Dec. 118, note 121; note to *Blue v. Blue*, 87 Id. 281, where other cases are collected. The principal case is cited in *Kaer v. Haas*, 27 Minn. 410, to the point that no mere change in the title of the claimant of a homestead, so long as he retains sufficient title to support the homestead claim, can affect the exemption of the homestead.

HENDRIE v. BERKOWITZ.

[37 CALIFORNIA, 112.]

WHERE ONE OF TWO PARTNERS INDORSES NOTE IN NAME OF FIRM, as an accommodation for a third person, without the authority or consent of the other partner, the latter is not bound by such indorsement as to any party taking the note with notice that the indorsement was made in the character of surety. And, in such case, the burden of proving the authority or consent of the copartner rests on the creditor or holder of the note.

WHERE THIRD PERSON FINDS NOTE, INDORSED BY MEMBER OF FIRM IN FIRM NAME, IN HANDS OF MAKER, this is notice to him that the firm indorsement was for the accommodation of the maker.

APPEAL. The opinion states the case.

Brents, for the appellant.

Whitney and Naphtaly, for the respondent.

By Court, SAWYER, C. J. Defendants Ney and Berkowitz were partners in the business of manufacturing and selling women's cloaks and mantillas, under the name and style of J. L. Ney & Co. The business did not extend to other matters. On the 17th of September, 1866, George W. Ward, for the purpose of raising money for his own use, executed a promissory note for two thousand dollars, and interest at one and a quarter per cent per month, payable thirty days after date, to the order of J. L. Ney & Co., which note Ney, at Ward's request, for his accommodation, and without the knowledge or consent of Berkowitz, indorsed in the name of the firm, and the plaintiff, Hendrie, discounted the note, after such indorsement, for defendant Ward, paying him the face of the note. This is the only instance of an accommodation indorsement in the name of the firm; and by the terms of the written contract between the partners existing at the time, Ney was not to sign notes in the name of the firm.

This action is brought on the said note against Ward, as maker, and Ney and Berkowitz, as indorsers. Ward made no defense at the trial, and Ney, although present as a witness for plaintiff, was not served, and did not appear in the action. Plaintiff had a verdict and judgment against Ward and Berkowitz, and his motion for new trial having been denied, Berkowitz appeals from the order denying the motion, and from the judgment.

The act of indorsing the note for the accommodation of Ward was clearly neither within the scope of the ordinary

business of the partnership, nor in accordance with any habit of dealing of the partnership, known or unknown; for this is the only transaction of the kind had in the name of the firm. No authority in Ney, therefore, can be inferred or implied on either of these grounds to make an accommodation indorsement in the firm name; and either an express authority or consent on the part of Berkowitz, at the time, or a subsequent ratification of the act of Ney by him, must be shown in order to charge Berkowitz in favor of a party having notice that the indorsement was made in the character of surety for Ward. When one of two partners subscribes the copartnership name to a note, as surety for a third person, without the authority or consent of the other partner, the latter is not bound, as to any party taking the security with notice; and the burden of proving the authority or consent of the other partner lies on the creditor or holder of the note: *Foot v. Sabin*, 19 Johns. 155 [10 Am. Dec. 208]; *Laverty v. Burr*, 1 Wend. 531; *Rollins v. Stevens*, 31 Me. 454; *Sweetser v. French*, 2 Cush. 311 [48 Am. Dec. 666]; *Williams v. Walbridge*, 3 Wend. 417; *Bank of Rochester v. Bowen*, 7 Id. 158; *Boyd v. Plumb*, 7 Id. 309; *Stall v. Catskill Bank*, 18 Id. 478; *New York Fire Ins. Co. v. Bennett*, 5 Conn. 580 [13 Am. Dec. 109].

Under the law as thus stated, and as the same was substantially given to the jury in the charge of the court, the jury must have found either that Ney had authority to indorse in the firm name as surety for Ward, or that Berkowitz subsequently ratified the act, or that plaintiff took the note without notice that the indorsement was for the accommodation of Ward; otherwise, the verdict must have been for the appellant. Berkowitz specifies as grounds for a new trial that the evidence is insufficient to justify the jury in finding in favor of plaintiff on either of these points, and we are of opinion that his position is sustained by the evidence, as it appears in the record.

It is very clear, as we have before stated, that there was nothing in the nature of the business, or in the known habits of dealing of the firm, from which Ney's authority could be inferred, and it was necessary for the plaintiff to show affirmatively express authority, or the assent of Berkowitz to the act, or a ratification of the act after it was done. No express authority or assent, before or at the time of the act, is even attempted to be shown. On the contrary, it appears, that by their contract in writing, Ney was not permitted to sign notes at all

in the name of the firm. Berkowitz was not present at the time of the indorsement, and it is not pretended that he knew anything about it till after it was done. The only testimony that can be claimed to have a shadow of tendency to show that Berkowitz ratified the indorsement is that of Ney himself. He says that, after the indorsement, "I really do not recollect" when, the same day or the next, he informed Berkowitz of it, saying at the time that he, Ney, "thought Ward was good, and might do us a similar favor in future. He [Berkowitz] did not say anything particular against it, that I recollect." On cross-examination to the question, "Did he [Berkowitz] remonstrate against your signing the firm name?" he answered, "He did n't particularly, that I recollect." This is the entire testimony to show a subsequent ratification, and this is at best negative testimony, resting upon a want of recollection. He simply did not recollect that Berkowitz said "anything particular" against it, at the only time when his attention is pretended to have been called to it. It is not pretended that he said anything in favor of it, or in fact anything at all. Berkowitz testifies positively that Mr. Ney, "my partner, came and asked me whether he should indorse a note. I told him he had no right to do so"; that "he spoke to me, and I at once refused"; and that he did not learn for the first time that the note had been indorsed "till this suit was commenced by attachment." Ney nowhere states that he did not ask his partner if he should indorse the note, or that Berkowitz did not refuse, or tell him he had no right to do so. The only point of conflict is, as to whether Ney informed Berkowitz of the indorsement after it was made, and on this point, or as to what took place at the time, Ney's recollection is far from distinct. Taking the testimony in its strongest aspect against appellant,—as to the point wherein there is a conflict,—and the worst that can be said is, that Ney informed Berkowitz, after the act was done, that he had indorsed the note, and he did not recollect that Berkowitz said "anything particular against it." This want of recollection as to what Berkowitz did or did not do or say, in the face of the other uncontradicted testimony of Berkowitz, or even without it, is clearly insufficient to justify a jury in finding a ratification of the act on his part after it was done. There was certainly no express ratification shown, and what took place at this time in no way came to plaintiff's knowledge or affected his action. In *Mercein v. Mack*, 10 Wend. 464, a stronger case was held not to manifest assent.

It only remains to inquire whether, on the evidence, the jury were justified in finding that plaintiff had no notice of the fact that the indorsement was made for the accommodation of Ward.

On this point, also, there is no conflict in the evidence, and the determination of the point rests on the testimony of plaintiff himself. He testifies, it is true, that he had no knowledge that the note was made for the accommodation of Ward; that he did not know it was made for the purpose of raising funds for Ward. But this general denial of knowledge must be taken in connection with other specific facts stated by the plaintiff. He says he gave the money to the party from whom he received the note, and that party "was a broker representing Ward." He further says, "I don't know whether Ward received the money directly from me or the broker"; and that he, plaintiff, "gave the money, expecting it to go to Ward." He knew, then, that he was dealing with Ward in discounting the note, and Ward was the maker, and not the payee, of the note. The note did not come to him in the regular course of business when the note is made for the benefit of the payee, but only in due course of business when the transaction is for the benefit of the maker of the note, and the payees and indorsers are sureties. He found the note in the possession of the maker himself, who was primarily liable, instead of in the hands of the payees, or of some party who apparently received it from the payees in the regular course of their partnership business. This is an indication upon the face of the transaction, either that the note has been paid and taken up by the maker, and is therefore dead, or that the payees and indorsers are but sureties; and it is so understood in the business world. The plaintiff was bound in law to take notice of these facts in discounting the note for the maker. Upon this point, Mr. Chancellor Walworth, in *Stall v. Catskill Bank*, 18 Wend. 478, well observes:—

"If, therefore, it appears upon the face of the paper that the partnership name is signed as surety for some other person, the party who takes the note from such person has actual notice of the fact that it is not signed in the ordinary course of partnership business. He must, therefore, at his peril, make the necessary inquiries, and ascertain that there is some special authority for one partner to sign the partnership name as such surety, either express or implied. So if the drawer of a note carries it to the bank to get it discounted on his own ac-

count, or transfers it to a third person, with the name of the firm indorsed thereon, the transaction on its face shows that it is a mere accommodation indorsement, or the note would not be in the hands of the drawer; and the bank or person who receives it from the drawer, being thus chargeable with notice that the firm are mere sureties of the drawer, and that it has not passed through their hands in the ordinary course of the partnership business, the members of the firm who have been made sureties without their consent are not liable to such holder of the note."

So in *Bank of Rochester v. Bowen*, 7 Wend. 159, a case very similar to this as to the state of the testimony bearing on the point now under consideration, the court, by Mr. Justice Nelson, say: "The cashier of the bank, who must be considered the agent of the plaintiff, states expressly that the loan was negotiated by Bowen, one of the defendants [one of the makers]; that he procured the note, and that the money was placed to his credit in the bank, which was afterwards drawn out by him upon his own checks; that he considered the note Bowen's at the time of the negotiation of the loan. This testimony, unexplained and uncontradicted, was, undoubtedly, sufficient to repel the *prima facie* inference that the firm of Aldrich and Searle were principals to the note, and imposed upon the plaintiffs the burden of proving affirmatively either that Aldrich and Searle are interested in the loan, or that Searle consented to become security for the same." The same principle is recognized in *Austin v. Vandermark*, 4 Hill, 262; *Gansevoort v. Williams*, 14 Wend. 133; *New York Fire Ins. Co. v. Bennett*, 5 Conn. 580 [13 Am. Dec. 109].

Now, in this case, the plaintiff, according to his own uncontradicted testimony, knew, or at least supposed, he was discounting the note for the maker, Ward, and not for the payees and indorsers; and in the language of Mr. Chancellor Walworth, *supra*, "the transaction on its face shows that it is a mere accommodation indorsement, or the note would not be in the hands of the drawer; . . . and being thus chargeable with notice that the firm are mere sureties of the drawer, and that it has not passed through their hands in the ordinary course of the partnership business," he also was chargeable with knowledge that Berkowitz, if made surety without his consent, was not liable.

The evidence, as presented in the record, clearly does not justify the jury in finding that plaintiff took the note without

notice of the character in which the indorsement was made. He took the note under such circumstances that he was bound under the law to inquire into the character of the indorsement, and as to the authority of Ney in the premises, or take it at his peril.

Judgment and order reversed, and a new trial granted, and *remittitur* directed to issue forthwith.

CROCKETT, J., having been of counsel, did not sit in the case.

POWER OF PARTNER TO BIND HIS COPARTNERS BY NOTE IN FIRM NAME: See *Crocker v. Kyrker*, 51 Am. Dec. 724, note 723, where other cases are collected. Where a partner indorses a note in the name of the firm, neither within the scope of the ordinary business of the partnership, nor in accordance with any habit of dealing of the partnership, known or unknown, the presumption is, that the indorsement was an accommodation indorsement, and the burden of proving the consent of the copartner, who did not write it, is on the holder: *Lemoine v. Bank of N. A.*, 3 Dill. 51, citing the principal case.

BAGLEY v. WARD.

[57 CALIFORNIA, 121.]

WHERE, IN ACTION OF EJECTMENT, ATTORNEYS MAKE STIPULATION LIMITING ISSUES TO TITLE THEN HELD by the respective parties, a sheriff's deed to one of the parties, executed after the stipulation was made, is not admissible in evidence, though the deed is given upon a sheriff's sale made before the signing of the stipulation.

TITLE ACQUIRED BY DEFENDANT THROUGH SHERIFF'S DEED EXECUTED AFTER COMMENCEMENT OF ACTION of ejectment can only be made available by supplemental answer.

PRODUCTION OF PAPERS MENTIONED IN STATUTE AS NECESSARY TO ENABLE PARTY TO REDEEM may be waived by a purchaser at an execution sale, as between himself and a redemptioner; and a creditor not claiming to be a redemptioner, but proceeding to sell the property under his own execution, has no right to complain of such waiver.

REDEMPTION FROM SHERIFF'S SALE IS VIRTUALLY TRANSFER OF CERTIFICATE OF SALE, and if a party, being entitled to redeem, effects the redemption to the satisfaction of the purchaser, the sheriff's deed to him passes the same title that it would have passed to the purchaser had it been executed to the latter without redemption.

IF PURCHASER AT SHERIFF'S SALE ACKNOWLEDGE IN WRITING REDEMPTION by one entitled by law to redeem, the sheriff has authority to execute to him a deed, without inquiry as to the papers produced to the purchaser.

PURPOSE OF ATTACHMENT IS TO HOLD PROPERTY OF DEFENDANT AS SECURITY for such judgment as may be rendered, and when the judgment is rendered, and becomes a lien upon the property attached, the lien of the

attachment becomes merged in that of the judgment, and its only effect thereafter is to preserve the priority thereby acquired, which priority is maintained and enforced under the judgment. The attachment lien does not revive on the expiration of the judgment lien.

ONLY PURPOSE OF EXECUTION IN RESPECT TO REAL ESTATE WHILE JUDGMENT LIEN SUBSISTS is to enforce the lien by a sale of the property.

LANDS NOT SUBJECT TO JUDGMENT LIEN MAY BE LEVIED UPON under an execution.

TO PRESERVE PRIORITY ACQUIRED BY JUDGMENT LIEN, sale must be made during the statutory period of the lien.

COPY OF EXECUTION LEVIED ON REAL ESTATE, WITH LEVY INDORSED thereon, need not be filed in recorder's office.

WHERE NO JUDGMENT OR ATTACHMENT LIENS EXIST, LEVY OPERATES UPON REAL PROPERTY as it does upon personal property; that is, the execution first served has priority.

LEVY OF EXECUTION UPON REAL ESTATE, DURING PENDENCY OF JUDGMENT LIEN, neither extends such lien nor creates a new lien.

IF EXECUTION IS LEVIED ON REAL ESTATE, WHILE JUDGMENT LIEN SUBSISTS, and is returned without a sale, and after the judgment lien expires another execution is issued and levied, and a sale is made, such sale takes effect by relation at the time when the second execution was levied.

LEVY OF EXECUTION AND SALE OF REAL PROPERTY DURING EXISTENCE OF PRELIMINARY INJUNCTION restraining the same renders the sale voidable, and the execution and sale may, upon proper proceedings taken, be set aside. But such a sale is not void, and a deed made under it confers a valid title.

EJECTMENT to recover possession of the undivided half of a lot in the city and county of San Francisco. The attorneys for the respective parties stipulated that the sole issue to be tried was, which party to the suit had succeeded to the title of Sanders and Brenham. The injunction referred to in the opinion was granted under the following circumstances: On the 9th of December, 1855, Brenham commenced a suit against Sanders to dissolve the partnership of Sanders and Brenham, and secured the appointment of a receiver. Peyton, the receiver, commenced an action against the various creditors, alleging that they were obtaining judgments against Sanders and Brenham, and were threatening to sell the property of the firm at sheriff's sale, and refused to recognize his rights as receiver. The injunction was granted upon this complaint. The defendants had judgment in the court below, and the plaintiff appealed. Other facts are stated in the opinion.

G. F. and W. H. Sharp, for the appellant.

William Hayes and Sydney V. Smith, for the respondents.

By Court, RHODES, J. The plaintiff claims title through the judgment of *Martin v. Sanders and Brenham*, rendered Novem-

ber 22, 1855, and the defendant, through the judgment of *Masset v. Sanders and Brenham*, rendered November 19, 1855. There are other judgments involved in the case, but the two mentioned present all the material questions. It was stipulated that the "sole issue to be tried herein is which party succeeded to the title of Sanders and Brenham." An attachment was issued in the Martin case, which was levied on the property in question November 6, 1855. An attachment was also issued in the Massett case at the commencement of the action, but it does not appear that it was levied. An execution was issued upon the Martin judgment November 22, 1855, which was levied upon the property on the next day; and on the 24th of November, 1855, an execution upon the Massett judgment was issued and levied upon the property. In December, 1855, a temporary injunction was issued in the action of *Peyton v. Scannell, Sheriff*, restraining all proceedings under the judgments and executions above mentioned, and the sheriff returned both the executions. The injunction was dissolved June 5, 1858. A second execution was issued on the Massett judgment November 19, 1857, — pending the temporary injunction, — and under it the property was levied upon, and sold to Ward December 10, 1857, and was conveyed to him by the sheriff in 1862.

A second execution was issued on the Martin judgment December 30, 1857, which was returned without making sale, and a copy was filed in the recorder's office February 6, 1858; and on the 30th of April, 1858, a third execution was issued, under which the property was sold, June 5, 1858, to Sharp. In 1856 Griffith recovered a judgment against Sanders and Brenham, and under it he redeemed the property from the sale under the Massett judgment, and in June, 1859, the sheriff conveyed the premises to him as a redemptioner, and in the following month Griffith conveyed the same to Ward, the defendant.

The sheriff's deed to the defendant, of the date of June 29, 1862, was not admissible in evidence. It was executed subsequently to the stipulation, which limited the issue to the title then held by the respective parties. The rule upon which the defendant relies — that a sheriff's deed takes effect by relation, for certain purposes, at the date of the sale — does not obviate the objection, for the legal title alone is in issue in the action, and that did not pass until after the stipulation was made and the answer filed. Whatever title was acquired under the

deed, it could not be relied on by the defendant without having been set up by supplemental answer: *McMinn v. O'Connor*, 27 Cal. 247; *Moss v. Shear*, 30 Id. 472.

The plaintiff's objection to the evidence and findings in respect to the redemption by Griffith from the sale to defendant is not well taken.

The plaintiff introduced evidence showing that such redemption was made, and he cannot complain that the defendant did not supplement the evidence by production of the papers upon which Griffith claimed the right. The sheriff's return, produced by the plaintiff, had this indorsement: "The within-described property redeemed by Mellen Griffith, this twenty-fourth day of February, 1858. James C. Ward, by George R. Ward, attorney." Whatever may be the rule where another creditor or the judgment debtor claims the right to redeem either from the purchaser or redemptioner who resists the claim, it is clear that, as between the immediate parties to the redemption, the production of the papers mentioned in the statute may be waived. A creditor not pursuing that remedy, but proceeding under his own execution, has no more cause to complain of such waiver than of the fact that the purchaser did not insist upon all the percentage to which he was entitled. The redemption is virtually a transfer of the certificate of sale, and although the redemptioner might not be entitled to demand the amount of his lien from a subsequent redemptioner, because of his failure to strictly comply with the law, yet, if he was entitled to redeem, and effected the redemption to the satisfaction of the purchaser, the sheriff's deed passed the same title that it would have done had it been executed to the purchaser without redemption. It was held in *People v. Ransom*, 4 Denio, 148, that the purchaser may dispense with the production of any paper which would be required where the redemptioner was enforcing the right of redemption against a purchaser. Mr. Justice Bronson, in delivering the opinion of the court, said: "The immediate parties to the transaction [the redemption] may make what bargain they please. They may respectively insist on all that the law will give them, or they may accept of less. But whether they can omit anything required by the statute, so as to affect other creditors coming to purchase, is a very different question." The opposite view was taken in *People v. Ransom*, 2 N. Y. 490, in which it was considered that the question was one of power in the sheriff to execute the deed; but we think the opinion of Mr. Justice

Bronson is more consonant with principle and reason; and we are of the opinion that, if the purchaser acknowledge in writing the redemption by one entitled by law to redeem, the sheriff has authority to execute to him the deed, without inquiry as to the papers produced to the purchaser.

We come now to a question of greater importance and of some difficulty,—the question upon which the former decision mainly turned,—whether the levy of an execution upon real estate, during the pendency of a judgment lien, constitutes a new and distinct lien. We regret that counsel have not given this question more thought and labor. The chief cause of difficulty in construing the statute arises from the circumstance that our statute is mainly copied from that of New York, in which the lien of the judgment continues for ten years from the docketing, and an execution may be issued at any time within five years, and after that time on leave of the court; while, under our statute, the lien of the judgment continues two years from the time it is docketed, and execution may issue at any time within five years.

In the investigation of the question, the attachment, judgment, and executions will come up for review. The purpose of an attachment is to hold the property of the defendant as security for such judgment as may be rendered: Practice Act, sec. 120; and when the judgment is rendered and becomes a lien upon the property attached, the lien of the attachment becomes merged in that of the judgment, and the only effect thereafter of the attachment lien upon the property is to preserve the priority thereby acquired, and this priority is maintained and enforced under the judgment. If it does not cease at that time, except as giving priority to the judgment lien, when does it cease? Does it continue after the judgment lien has expired by limitation? The attachment lien, as to its amount, depends upon the *ex parte* statement of the plaintiff, while that of the judgment is certain. The lien of the latter is of a higher order, if it is possible that there can be different ranks among the liens. We will hazard the assertion that the law does not contemplate the existence, at the same time, of two distinct liens, arising by operation of law in one action, for the security of one demand. If the position is correct that the attachment lien ceases, except as maintaining priority for the judgment lien upon the property attached, it does not revive on the expiration of the judgment lien. Our remarks are con-

fined to real property, as the judgment does not constitute a lien upon personal property.

The judgment being a lien for two years from the time it is docketed upon the real estate of the defendant within the county in which the judgment is docketed, and a lien for the same time upon the real estate in any county in which a transcript of the docket is filed with the recorder, such liens are enforced by executions. That is the only purpose of the execution in respect to real estate while the judgment lien subsists. Section 210, prescribing the form of the execution, provides that it shall require the sheriff to satisfy the judgment out of the personal property of the debtor, etc.; "or if the judgment be a lien upon real property, then out of the real property belonging to him on the day when the judgment was docketed; or if the execution be issued to a county other than the one in which the judgment was recovered, on the day when the transcript was filed in the office of the recorder of such county, stating such day, or at any time thereafter." This section manifests the purpose of the execution so far as respects the lands that are covered by the lien of the judgment. Under the execution, doubtless, lands not subject to the judgment lien may be levied upon. It is provided in section 217 that all property, both real and personal, of the judgment debtor "may be attached on execution in like manner as upon writs of attachment." We are not required in this case to reconcile the apparent conflict between this section and section 210, which prescribes what the execution shall contain, but we shall hereafter recur to the subject of a levy of the execution upon real property not subject to the lien of the judgment.

The doctrine of *Wood v. Colvin*, 5 Hill, 228, — that the judgment being a lien upon the lands, a levy is unnecessary, that the judgment binds the lands, and the execution comes as a power to sell, — is often cited with approbation, and is, we think, the correct rule. The same principle is stated in *Catlin v. Jackson*, 8 Johns. 548. The chancellor, in delivering the unanimous opinion of the court of errors says: "In several essentials the effect of the execution must be different from a *fi. fa.* levied on personal estate only. The delivery of the *fi. fa.* gives no new rights to the plaintiff, and vests no new interests. The general lien is created by the judgment, and the execution is merely to give that lien effect, — not by vesting a possessory right to the land affected by it in the plaintiff, but by designating it for a conversion into money by the operation of the

fi. fa., and the act of the sheriff by virtue of it." Although a levy of the execution is unnecessary to give effect to the judgment lien, yet that course is usually pursued, and the question arises whether the levy creates a new lien distinct from that of the judgment.

The statute has not declared that the levy shall constitute a lien. At common law, the levy did not constitute a lien upon lands, nor could the title to lands be affected by an execution in satisfaction of a money judgment. Under a *levari facias*, not even the possession of lands, but only the present profits, were transferred; and when the writ of *elegit* was given by statute, the possession of a moiety of the defendant's lands was given to the plaintiff: 3 Bla. Com. 417. Mr. Chancellor Kent, in discussing the subject of the lien of judgments, executions, etc., says: "The lien, after all, amounts only to a security against subsequent purchasers and encumbrancers; for, as the master of the rolls said in *Brace v. Duchess of Marlborough*, it was neither *jus in re* nor *jus in rem*,—the judgment creditor gets no estate in the lands; and though he should release all his right to the land, he might afterwards extend it by execution": 4 Kent's Com. 437. A lien being a mere priority over subsequent purchasers and encumbrancers, it is a contradiction of terms to say that by the levy a new priority is acquired, which, instead of antedating, must, of necessity, post-date the priority already held.

The doctrine in New York and in this state is, that, in order to preserve the priority acquired by the judgment lien, the sale must be made during the statutory period of the lien: *Isaac v. Swift*, 10 Cal. 81 [70 Am. Dec. 698]; *Row v. Swart*, 5 Cow. 294; *Little v. Harvey*, 9 Wend. 158; *Tufts v. Tufts*, 18 Id. 621; *Graff v. Kip*, 1 Edw. 619; *Pettit v. Shepherd*, 5 Paige, 493 [28 Am. Dec. 437]. This was so held on the ground that the opposite rule would extend the lien beyond the time mentioned in the statute. It would seem unaccountable that the legislature should have been so particular in fixing the period of the existence of the judgment lien, and that the courts should have been so careful in maintaining it, if, at the same time, the plaintiff might have acquired a lien through the execution that would last for the lifetime of the judgment.

In the cases cited, when the executions were issued, but the lands were not sold during the lien of the judgments, there was abundant room for the question now presented. The vice-chancellor said, in *Graff v. Kip*, *supra*: "A plaintiff must

take care to sell the lands of the defendant before the expiration of ten years, in order to avoid the danger of other encumbrances intervening; or if he wishes to continue the lien without a sale, then he must have a fresh judgment docketed before the other creditors come in and obtain judgments." His familiarity with the effect of the levy of executions would readily have suggested to him the lien of the execution instead of that of a "fresh judgment," if, in his opinion, the former constituted a lien, pending the lien of the latter. Mr. Justice Harris says: "The doctrine on the subject [dormant executions] does not apply to real estate, the lien upon which depends upon the docketing of the judgment, and not upon the execution or levy": *Muir v. Leitch*, 7 Barb. 341.

There are several provisions of the statute that throw light upon, and in some degree test, this question. Suppose a judgment is docketed, and execution issued and levied upon the defendant's lands, but no sale made within the two years of judgment lien, and that one year subsequent to the docketing of the first, another creditor obtains and docketts his judgment, and issues and levies his execution on the same lands. The senior judgment, after the two years of its lien, loses its priority, and we have seen that a sale upon execution, after that time, does not extend the lien of the judgment, and during the third year after the docketing of the judgment, the levy, if it constituted a lien, became a dormant lien, for during that year the junior judgment has priority, and a sale under it would pass the title; and if, after the expiration of the third year, without sale under the junior judgment, the priority shifts back to the first levy, it must be worked out by a process of revivor, for which we find no warrant in the statute. Or suppose the judgment defendant sells and conveys the lands during the existence of the judgment lien, and after the levy of the execution, but there is no sale under the execution until after the judgment lien expires, do the lands remain chargeable with the judgment? No one will so affirm, unless he is prepared to say that a judgment remains a lien as against subsequent purchasers for five years. Subsequent encumbrancers stand on the same footing with subsequent purchasers as to the operation of prior liens.

The Practice Act, section 230, provides for a redemption, and those entitled to redeem are the judgment debtor, his successors in interest, and a creditor having a lien by judgment or mortgage subsequent to that on which the property was sold.

It is unaccountable that the legislature should have omitted those having liens by executions, if it was intended that the levy should create a lien. It is provided by section 231 that the redemptioner shall pay not only the purchase-money, with the percentage, etc., but also the amount of any lien prior to that of the redemptioner. Had the second creditor, in the case first supposed, sold the lands during the second year of his lien, the first creditor could not have redeemed, because he did not hold a subsequent judgment lien; but if the first creditor had purchased at that sale, and a third judgment creditor had come to redeem, he would not have been required to pay the amount of the first judgment, because it did not then constitute a lien; but he would have to satisfy the execution issued upon it, if the levy did, in truth, amount to a lien.

Under our statutes, the period of the docket lien is less than that during which an execution may issue, and the same is the case in New York, as well as in many other states. According to the provisions of section 214 of the Practice Act in force up to 1861, an execution might issue, as of course, within five years from the entry of the judgment; and after that time, upon leave of the court, upon showing that the judgment, or some portion of it, remained unsatisfied and due. The shorter period of the judgment lien was adopted for the purpose of leaving real estate unencumbered, as far as possible, consistently with the just demands of creditors for adequate security. The brief time of the lien of a mortgage—four years—also indicates the same policy of the law. Not only would this purpose be defeated if the creditor could, during the judgment lien, acquire a new lien, not merely co-extensive with that of the judgment, but even extending to a time after a recovery upon the judgment itself was barred by the statute of limitations; and it would seem that the courts were trifling in holding that the levy and proceedings for the sale did not extend the docket lien, an operation that would be useless in the presence of a lien that might continue longer than was possible for the docket lien. If the defendant conveys his real estate, subject to the judgment lien, and an execution is thereafter issued during the period of that lien, such real estate may be levied on and sold under the execution, and if the levy produces a lien, it results that, by operation of law, a lien may be acquired to secure the satisfaction of the judgment upon property which the judgment debtor does not

then own. No one would contend for such a principle. If there was no lien when the defendant sold the property, none could be produced by a levy; but if there was a judgment lien, and the property conveyed to the third person is levied upon and sold under execution, evidently the sale must be the enforcement of the judgment lien, as that was the only existing lien.

Where there are several executions in the hands of the officer at the same time, under which the lands are sold, it is held that the money must be applied first to the satisfaction of the oldest existing judgment lien: *Roe v. Swart*, 5 Cow. 294; *Barker v. Gates*, 1 How. Pr. 77; *Jackson v. Roberts*, 11 Wend. 422. It was held in *Roe v. Swart*, *supra*, that, although the execution upon the first judgment was issued within ten years from the docketing, yet, as the sale was not made within the ten years, the money must be applied to the satisfaction of the second judgment. And where an execution was sent to another county, and was received by the sheriff before the judgment was docketed in that county, the execution took priority from the date of the docketing: *Stoutenburgh v. Vandenburg*, 7 How. Pr. 229.

The policy of the law, in requiring conveyances, instruments, and proceedings affecting real estate to be made a matter of record, so as to impart notice to those dealing with the property, is manifest from numerous provisions of the statute. The provisions for the recording or filing in the proper office of deeds, mortgages, contracts, notices of *lis pendens*, judgments, and attachments, are familiar instances. It may be contended, and perhaps maintained, that by the provisions of section 217, that property "may be attached on execution, in like manner as upon writs of attachment," it was intended that a copy of the writ, with a description of the property levied upon, as in the case of an attachment when real property is seized, should be filed in the proper recorder's office; but however this may have been, it is too late now to insist on that construction. The practice has been almost uniform since the adoption of that provision in 1851, to omit the filing of a copy of the execution in the recorder's office. Cases almost innumerable have been litigated in which the levies of executions were in question, and it has not been held anywhere, so far as we are apprised, that the filing of a copy of the execution and levy in the recorder's office was essential to the maintenance of the levy. Vast amounts of land are

held under execution sales in which copies of the writ and levy were not filed in the recorder's office; and a change in the construction of the clause of the section mentioned, even if we thought the practical construction given to it was incorrect, would be followed by most disastrous consequences. The change in the practice, if any is necessary, should be made by the legislature, so that its operation might be only prospective. It requires no argument to show the bad policy, if not injustice, of charging those dealing with the property with constructive notice of a lien which is not a matter of record.

Where there are no judgment or attachment liens, the levy operates upon real property as it does upon personal property, — that is, the execution first served has priority. Whether such priority extends to subsequent conveyances, mortgages, or judgments, it is unnecessary in this case to determine. Nor does it become necessary to inquire as to the priority of executions levied before, but the sales made after, the expiration of the judgment liens; for the property in controversy was, in each case, levied on and sold under an execution issued after the expiration of the judgment lien, and by the successor of the sheriff to whom the first executions were issued. The common-law rule, that the officer who has commenced the execution of process may complete it, though the return day has passed, will not aid the plaintiff; for the rule has not been extended so as to give such power to the officer's successor, except when the power is conferred by statute; and we have no statute that would reach the case; and besides this, the officer who made the sale did not pretend to act under the executions which were first levied upon the property.

If the plaintiff is restrained from issuing or proceeding with his execution until the judgment lien is about expiring, and therefore insists that he ought to have the benefit of a lien by means of the levying of the execution, the answer is, that he may demand adequate security when the restraining order is made. If he could acquire such a lien, there is but little doubt that, in order to avoid contingencies, he would, in most cases, make the execution lien cover all that the judgment lien did, and thus the latter lien would, in effect, be extended three years beyond its original limit. If a lien of a greater duration is desired, the remedy is with the legislature; and the provisions of the statute on this subject might then be brought into more complete harmony.

Our conclusion upon this branch of the case is, that, pending the judgment lien, the levy of the execution neither extends the existing lien nor creates a new lien; that the sales under the executions took effect by relation at the time they were respectively levied, and not at the date of the levying of the previous executions.

The sale and conveyance under the Massett judgment, being prior to that made under the Martin judgment, the title to the property vested in the defendants, unless the sheriff's sale was not merely voidable, but void, because of its having been made while the preliminary injunction in *Peyton v. Scannell*, *supra*, was in force. The deed was executed after the injunction was dissolved. Counsel have not cited any authority to this precise point, and we shall not discuss the question at any considerable length. The cases all agree with those cited by the plaintiff, that a sale under such circumstances was a violation of the injunction, and that, pending the injunction, Massett might have been punished therefor as for a contempt, and that during the same time both the execution and sale might, upon proper proceedings, have been set aside. In many cases of sale or transfer of property in disregard of an injunction issued at the instance of a judgment creditor, the defendant has been fined to the extent of the judgment and costs. The court, we apprehend, would not be so exact in measuring the penalty which is usually imposed for the benefit of the injured party, if he still retained his original security for the payment of his judgment, notwithstanding the sale by the defendant, as surely would be the case if the sale was void. Nor would there be any necessity or even propriety in ordering a restoration of the property to its previous condition, if its attempted disposal in violation of the injunction was absolutely void.

We are of the opinion that the sale was not void.

Judgment affirmed.

SAWYER, J., delivered a dissenting opinion, in which Sprague, J., concurred, of which the following is a synopsis:—

The question arises on the facts in the case, whether a distinct and independent lien can attach to real estate by virtue of an actual levy of an execution upon land upon which the judgment under which the execution issued is, by virtue of its being docketed, already a lien, and if so, whether the lien so acquired by a levy expires with the docket lien. The case of *Wood v. Cokain*, 2 Hill, 229, relied upon to show that no new independent lien is created by a levy, when the judgment is a lien, does not in any respect touch that question. The question there was, whether it was absolutely necessary to make an actual levy under the execution, in order to entitle the party to

sell, where the docketing of the judgment creates a lien. This is an entirely different question from the one under consideration. It is a mistaken notion that the judgment lien is of a higher nature than the lien by levy, and that the latter, therefore, merges in the former. On the contrary, if there is any difference, the lien by levy is of the higher nature. It is specific, takes hold of the specific piece of property by specific acts for the purpose of appropriating it to the specific purpose, while the judgment lien is general by mere operation of law, without any specific act directed to any particular piece of property, or the manifestation of any intention of the creditor to hold a lien on the specific property, attaches itself, generally, to all lands within the county that may come to the judgment debtor within two years after the judgment is docketed, without reference to any intent of the creditor to apply it in satisfaction of the debt: *Finch v. Earl of Winchelsea*, 1 P. Wms. 279; *Carter v. Champion*, 8 Conn. 559; S. C., 21 Am. Dec. 695; *Commonwealth v. McKisson*, 13 Serg. & R. 146. The probate act, sec. 141, provides that on a mere money judgment recovered in the lifetime of the deceased, no execution can be issued after his death, whether the judgment is a lien or not, for no execution is allowed to issue. It can only be paid "in due course of administration." But when a specific lien has been acquired by an actual levy of the execution upon property, "the same may be sold for the satisfaction thereof." Thus the specific lien of an actual levy is regarded by the statute, as it is in fact, of a higher nature than a general judgment lien. A levy creates a lien, when necessary to be made for any purpose, and such is an incident of every seizure in any mode recognized by law: *Wood v. Colein*, 5 Hill, 230; *Stauffer v. Commissioners*, 1 Watts, 300; S. C., 26 Am. Dec. 69.

Without any statutory provision affecting the question, except the adoption of the common law, an actual levy would create a lien. Unless there is something in our statute changing the effect of an actual levy on lands, or inconsistent with this idea, — that an actual levy, made while there is already an existing docket lien, creates a new, independent, specific lien of its own, not independent of the judgment, indeed, but independent of the general lien created by the judgment *proprio vigore*, under the statute, at the moment it is docketed, — then a specific lien is still a necessary incident to a levy. There is nothing in our statute limiting the effect of a levy. A party having a judgment may have execution before a docket lien is acquired, and again after it has expired: *Sharp v. Lumley*, 34 Cal. 611. In order to its enforcement when there is no judgment lien, a lien must be acquired, and this can only be done by levy. Real property cannot be affected by the execution until a levy: Practice Act, sec. 217. If a levy creates a specific lien upon the property before a judgment lien attaches, or after it expires, why is not the same act followed by the same consequences when performed while there is a judgment lien? The two classes of liens are not inconsistent; nor are they legally identical. Each is governed by the law of its own creation, and depends upon its own peculiar legal principles. There is nothing in the statute saying that an actual levy in one case shall not be followed by the same consequence as in the other. It cannot be said that the policy of the statute is to limit all liens to two years, for no such limitation is prescribed to liens acquired by levy, when there is, at the time, no docket lien in existence. It can only be said that all docket liens are limited to two years, leaving other liens to be governed by other principles. The legislature might well think it best to make a distinction between general and specific liens, in this respect. It might be thought a hardship to clog all the property that might come to

the debtor, while it would not be a hardship to continue a lien upon a particular piece of property which the creditor has actually seized, and thereby manifested an intent to hold as his security, allowing all the rest to go untouched. It is certain the legislature has only limited the general judgment lien, without saying anything about specific liens created by levy. There is another reason why a party should be allowed to secure a specific lien by levy, even while there is a judgment lien in existence. The sheriff is not permitted to sell without advertising for a period of twenty days. If he should fail to advertise till the nineteenth day before the expiration of the judgment lien, he could not sell, while it would continue alive. The effect would be to practically abridge the five years given him by statute, by nineteen days.

The *ab inconvenienti* argument to sustain the other view is not entitled to much weight against well-settled principles of law. I am of opinion that a creditor, by an actual levy of an execution on real estate, acquires thereby a specific lien distinct from and wholly independent of any general lien acquired by operation of law by the mere docketing of the judgment, which new lien is in no way affected by the expiration of the docket lien. After the expiration of five years from the entry of the judgment, the lien loses its vitality, of course; for the judgment is dead, and incapable of enforcement. But until then I do not see why the lien of the execution does not continue till the judgment is satisfied. This has not been a practical question in the older states under former statutes, because the lien and the judgment ran together, and expired together. But under our statute, the question becomes practical and important.

It is insisted that if Martin acquired a lien by virtue of the levy on November 23, 1855, the sale was not made on that execution, or by the same sheriff, but by his successor, on another execution issued to him; that the two sheriffs were not in privity; and that the second sheriff had no power to sell an interest seized by the first sheriff on another writ. It is true that when a levy has been made, and the execution returned with the levy indorsed, the officer who made the levy may go on and sell after his term has expired: *McFarland v. Guin*, 3 How. 717. So where an attachment was made on real estate, and returned, it has been held, under a statute substantially similar to ours, that a sale made by the officer after his term had expired was well made: *American Exchange Bank v. Morris Canal Co.*, 6 Hill, 366.

It does not necessarily follow, however, that the sale would not have been valid had the execution been directed to and executed by the new sheriff. No authorities have been cited to the effect that it would not have been valid. Real estate levied on is taken into the custody of the law rather than of the sheriff. The evidence of the levy must be by matter of record only. When the levy has been made, the lien attaches, and through the execution connects itself with the judgment, and when the execution is returned with the levy indorsed, the levy becomes matter of record, of which all must take notice. If a second execution issues, and is delivered to a succeeding sheriff, and he sells the land under the judgment, and in pursuance of his writ, I do not see why he would not perfect the lien before acquired into a perfect title. The first levy impressed a lien on the land, and, through the execution authorizing the seizure, connected it with the judgment, and under the second execution the land was sold, and the title passed. The property was the property of the debtor, subject to the creditor's lien, and the debtor's property is what the sheriff, under the second writ, was commanded to sell. The land, through the specific lien of the levy, was in the custody of the law for

the satisfaction of the judgment, and this satisfaction was worked out through the execution and sale by the sheriff. In the case of an attachment, the sale is not upon the same writ as that under which the levy is made, yet the sale under the execution subsequently issued must be valid. It is in the same suit, and the levy connects the lien with the judgment, through the writ of attachment, and the sale, under another and different writ, perfects the lien into a title. Why do not the same results follow when the levy is on a different execution in the same case?

In the case of personalty there might be some difficulty in consequence of want of possession, but no reason appears why a valid sale of realty could not be thus effected. The sheriff might in fact limit his sale to such interest as he himself seized. But in this case he sold the lot, not any particular interest, seized by him. While under the common-law rule the regular mode would have been for the former sheriff to have completed the execution of the process commenced, I think the sale by Doane was well made, and perfected the lien created by the former levy into a title. If I am correct in this, the lien under the first execution issued on the Martin judgment is prior to the defendant's lien under the Massett judgment, and the court erred in finding the latter to be prior. I see no reason for holding a levy to be discharged by a temporary injunction. The deed of January 29, 1862, was improperly admitted in evidence: *McMinn v. O'Connor*, 27 Cal. 247; *Moss v. Shear*, 30 Id. 472.

As to the Martin attachment, it is unnecessary to determine whether there was a levy or not. But if a levy was made, I do not see upon what principle the specific lien thus acquired merged in the judgment lien. An attachment lien is superior, rather than inferior, to the general judgment lien. I apprehend that a lien acquired by an actual levy, under an execution made before the judgment is docketed, would neither be lost, merged, nor modified by the subsequent docketing of the judgment. And I see no reason why the same principle should not apply with respect to a lien acquired by an actual levy under an attachment.

The sale under the Massett judgment, while an injunction existed, is not void, but is valid on a collateral attack. I am of opinion that the judgment should be reversed, and a new trial granted.

IN ACTION OF EJECTMENT, SUBSEQUENTLY ACQUIRED TITLE MUST BE SET OUT in supplemental answer: *People's Savings Bank v. Hodgdon*, 64 Cal. 96; *Kahn v. Old T. M. Co.*, 2 Utah, 186, both citing the principal case.

ATTACHMENT LIEN, ORIGIN AND NATURE OF: See *Franklin Bank v. Bachelor*, 39 Am. Dec. 601, note 606, where this subject is treated at length. When a judgment is rendered in an attachment suit, and becomes a lien on real property attached, the lien of the attachment is merged in the judgment: *Porter v. Pico*, 55 Cal. 174; *Tilton v. Cofield*, 2 Col. 401, both citing the principal case. The lien of an attachment takes effect from the levy thereof: *Ritter v. Scannell*, 70 Am. Dec. 775.

EXECUTIONS LEVIED ON PERSONAL PROPERTY ARE LIENS IN ORDER in which they are received by the sheriff: *Leach v. Pine*, 89 Am. Dec. 375; *Knox v. Webster*, 86 Id. 779, note 783, where other cases are collected. Where there is no judgment lien, the levy of an execution upon real estate operates as it does upon personal property: *Anderson v. Douglass*, 1 Coop. Tenn. Ch. 438, citing the principal case.

EXECUTION CREDITOR HAS NO LIEN ON PERSONAL PROPERTY UNTIL LEVY: *Knox v. Webster*, 86 Am. Dec. 773, note 782, where other cases are collected; *Reeves v. Sebern*, 85 Id. 513, note 516.

IN VERMONT IT IS NECESSARY TO VALIDITY OF LEVY OF EXECUTION on real estate that the execution and the officer's return thereon should be recorded in the proper office within the life of the execution and before the return: *Little v. Sleeper*, 86 Am. Dec. 697.

LIEN IS INSEPARABLE INCIDENT TO LEVY OF EXECUTION AT COMMON LAW: See *Hind's Heirs v. Scott*, 51 Am. Dec. 506, note 512, where other cases are collected.

EFFECT OF SUIING OUT EXECUTION TO CONTINUE LIEN OF JUDGMENT: See *Bank of Missouri v. Wells*, 51 Am. Dec. 163, note 166, where this subject is treated: *Isaac v. Swift*, 70 Id. 698, note 703.

LEVY OF EXECUTION DURING EXISTENCE OF JUDGMENT LIEN NEITHER CREATES NEW LIEN nor extends the judgment lien: *Rogers v. Druffel*, 46 Cal. 655; *Wby v. Foster*, 61 Id. 287, both citing the principal case.

THE PRINCIPAL CASE IS CITED IN *Hidridge v. Wright*, 55 Cal. 536, to the point that a redemption is virtually a transfer of the certificate of sale; and in *Martin v. Prather*, 82 Ind. 537, to the point that a sheriff's sale of land on execution under a judgment, after ten years, without revival and leave of the court, is voidable, but not void.

LEE v. FIGG.

[37 CALIFORNIA, 323.]

WHERE THERE IS NOT ENTIRE ABSENCE IN PLEADING OF ALLEGATIONS constituting cause of action or defense, and no demurrer is filed, or objection made in the court below, the judgment will not be disturbed by the appellate court.

CONVEYANCE WITHOUT CONSIDERATION, MADE BY DEBTOR FOR PURPOSE OF DEFRAUDING HIS CREDITORS, may be avoided by the creditors, whether the grantee was aware of the fraudulent purpose and actively aided it or not. He is not a purchaser in good faith.

JUDGMENT BY CONFESSION ENTERED IN OPEN COURT, AND REGULARLY SIGNED BY JUDGE, is not a nullity on its face because of defects in the statement of the facts out of which the indebtedness arose. If the court had jurisdiction of the subject-matter and of the parties, however irregular or erroneous it may be, it cannot be called in question in a collateral proceeding. It can only be attacked by the creditors of the defendant, who are defrauded thereby, and in a direct proceeding for that purpose.

WHERE COMPLAINT ALLEGES JUDGMENT, ISSUANCE OF EXECUTION AND SALE thereunder of land, and the answer denies the validity of the judgment, and that the plaintiff acquired any title by the pretended sale, the execution and sale are not sufficiently denied to require the execution to be put in evidence.

EJECTMENT for a lot of land in Sacramento. Barton Lee, the father of the plaintiff, owned the demanded premises in 1850. He failed in business, and conveyed this and other property to assignees in trust to pay his debts, amounting to several hundred thousand dollars. On the 26th of September, 1850, the assignees, at his request, conveyed the lot to F.

Ogden; and Lee, at the same time, also made a conveyance thereof to Ogden. No consideration was paid. In 1862, Ogden, at plaintiff's request, conveyed the lot, without consideration, to J. B. Haggin. In April, 1867, Haggin conveyed the demanded premises to the plaintiff without consideration. On May 4th, 1850, Barton Lee gave H. Cheever a mortgage on a larger lot, including the demanded premises, to secure the payment of two thousand five hundred dollars. Cheever assigned this debt and mortgage to Henley and Hastings. On the 10th of January, 1851, Barton Lee signed and filed the confession of judgment to Henley and Hastings, which is referred to in the opinion. Judgment was thereupon entered, as stated in the opinion. Execution issued under this judgment, and the sheriff sold the premises to J. P. Overton for ten thousand dollars, who entered into possession, and erected a brick building thereon. In 1851, Overton sold to one McCall; and the defendant held, at the commencement of this action, title derived from McCall through sundry mesne conveyances. The complaint was in the usual form, and was filed May 17, 1868. The answer, besides containing a general denial, set up an equitable defense, the material parts of which are as follows: "1. That on the 26th of September, 1850, one Barton Lee conveyed himself, and caused to be conveyed, to one Frederick Ogden, lot No. 5, in the block bounded by I and J and Second and Third streets, of Sacramento City, California, which said lot was of the value of twenty thousand dollars, and that thereby the legal title of said lot vested in the said Ogden; that at the time of said conveyance the said Barton Lee, by the title hereinafter stated, derived from John A. Sutter, owned said lot, and conveyed, and caused the same to be conveyed, to the said F. Ogden, without consideration, and for the purpose of hiding and secreting the same from his creditors, he, the said Barton Lee, being insolvent at the time, and being indebted to numerous creditors in the sum of several hundred thousand dollars." The complaint also alleged the recovery of the judgment by Henley and Hastings, the issuance of process and sale under it, the purchase by Overton, the execution of a sheriff's deed, and the recording of the same, and Overton's subsequent entry into the possession, and his erection upon said lot of a building which cost not less than fifty thousand dollars. The answer closed with a prayer that the plaintiff be decreed to convey to the defendant all the interest in the demanded premises which he acquired by the

deed from Haggin. The plaintiff filed a replication to the new matter, of which the material part is as follows: "And the said plaintiff is informed and believes, and upon information and belief, denies that the said Barton Lee was ever served with process in said supposed action of Henley and Hastings against said Barton Lee. And he denies that the said Barton Lee ever made any appearance therein; and he also denies that the said court had any jurisdiction to render said supposed judgment and decree, or either of them; and avers that the same and each of them is void; and that said supposed process and decree, on which supposed judgment said property is pretended to have been sold, was the said supposed judgment, and not upon any legal process issued out of this court." On the trial, the process upon which the sheriff sold, under the judgment against Lee, was not offered in evidence, but the sheriff's deed under the sale was introduced in evidence. The court below directed the plaintiff to convey all his interest to the defendant, and the plaintiff appealed. Other facts are stated in the opinion.

Robinson, Ramage, and Dunlap, for the appellant.

George Cadwalader, for the respondent.

By Court, SAWYER, C. J. Appellant's first point seems to be in the nature of a demurrer to the answer, on the ground that the facts stated are insufficient to constitute a defense. No demurrer appears to have been filed, and the point seems to be made here for the first time. There is not an entire absence of allegations of fraud in the transfer from Barton Lee to Ogden. There is an attempt to allege a transfer for the purpose of defrauding creditors of Lee, and if there is any objection to the pleadings, it is that the allegation is defective. The point was fully litigated on the trial, and in such case the judgment will not be reversed upon the point taken here for the first time: Practice Act, sec. 71; *King v. Davis*, 34 Cal. 100. But we think the answer sufficient. It avers that the conveyance to Ogden was without consideration, and this is sufficient to avoid it as to creditors of Lee, whether Ogden was aware of the fraudulent purpose of Lee and actively aided it or not. He was not a purchaser in good faith.

The judgment by confession in the case of *Henley and Hastings v. Barton Lee*, rendered in 1851, is not a nullity on its face, in consequence of the defects in the statement. The court had jurisdiction of the subject-matter and the par-

ties, however irregular or erroneous it may be, and it cannot be called in question in a collateral proceeding. It was entered in open court and regularly signed by the judge, as was the practice under the code of 1850: *Cloud v. El Dorado Co.*, 12 Cal. 133 [73 Am. Dec. 526]; *Arrington v. Sherry*, 5 Id. 513. The judgment is good as between Henley and Hastings and Barton Lee, and was only subject to be attacked for fraud by creditors of Lee, who were defrauded thereby, and that in some direct proceeding before a sale of the property under it to innocent parties: *Miller v. Earle*, 24 N. Y. 111. In this case the parties seeking to attack the judgment collaterally are not creditors of Lee, and they seek to avoid a sale under it of property which has long since passed into the hands of innocent purchasers. The cases of *Richards v. McMillan*, 6 Cal. 419 [65 Am. Dec. 521], *Cordier v. Schloss*, 12 Id. 143, S. C., 18 Id. 576, and *Wilcoxson v. Burton*, 27 Id. 229 [87 Am. Dec. 66], were all direct proceedings by creditors to vacate the judgments themselves on the ground of fraud; and the question was, not whether the several judgments were absolute nullities upon their face, but what was their value as evidence on the issue of fraud raised in the proceedings to impeach them. Or, what was the *prima facie* presumption arising on the face of the record from a failure to state fully the facts required by the statute with respect to the issue of fraud raised by the creditors, who claimed that they had been defrauded? The court held it to afford *prima facie* evidence of fraud, but that it was admissible to support this judgment by evidence showing that the transaction was *bona fide*, and the judgment rendered upon an indebtedness really due. This necessarily assumes that the judgment is valid till vacated upon a direct proceeding for the purpose. The case of *Chapin v. Thompson*, 20 Cal. 681, cited by appellant, affords him no aid. It will be found that the case in no respect touches the question.

We think the averments of the issuing of process and sale thereunder, under the Hastings and Henley judgment against Lee, are not sufficiently denied to require the execution to be put in evidence. The denial is rather of the effect of the facts averred than the facts themselves. The whole theory of the defense on this point is that the judgment is void upon its face, and the denials are shaped according to this theory.

Judgment and order affirmed, and *remittitur* ordered to issue forthwith.

JUDGMENT BY CONFESSION, WHEN VOID AND WHEN VALID.—It can seldom be said with correctness that a judgment by confession, without action, is absolutely void, in the strict sense of the term. Courts have not always employed the word "void," as applied to judgments, with absolute precision. Judgments have sometimes been denominated void when they were, in fact, void only as to a certain class of persons, but in other respects merely voidable. Thus in the cases of *Edgar v. Greer*, 7 Iowa, 136, *Kennedy v. Lowe*, 9 Id. 580, and *Bernard v. Douglas*, 10 Id. 370, language used by the court would seem to indicate that it regarded a confession of judgment made upon a defective statement of facts as void. But in the last of these cases the judgment was really declared void only so far as third parties were concerned. And in the subsequent case of *Plummer v. Douglas*, 14 Id. 69, S. C., 81 Am. Dec. 456, Baldwin, C. J., delivering the opinion of the court, said, in reference to the other two cases: "We do not think that the court, in the case of *Edgar v. Greer*, 7 Iowa, 136, or *Kennedy v. Lowe*, 9 Id. 580, decided that the judgments in those cases were entirely void. What the effect of such judgments would have been, as between the parties, had they not been appealed from, was not passed upon."

In *Davidson v. Alexander*, 84 N. C. 621, it was held that a proper statement was necessary to give the court jurisdiction, and that a judgment by confession, entered upon an insufficient statement of the indebtedness for which it was confessed, was irregular and void. In *Tucker v. Gill*, 61 Ill. 236, a judgment was confessed in vacation before the clerk, and was entered by him for twenty-six thousand dollars, although the amount confessed was fifty thousand dollars. It was decided that the judgment so entered was void. As the clerk had no judicial power, but acted merely in a ministerial capacity, it was held that he must either enter judgment for the sum confessed, or not at all. In *Carlin v. Taylor*, 7 Lea, 666, it was decided that a judgment rendered in Ohio, upon a power of attorney to confess judgment executed in Pennsylvania, against a person resident in Tennessee, without personal or constructive service of process, was void, and that *nul tiel record* was a good plea to an action thereon in Tennessee. In *Stein v. Good*, 115 Ill. 93, a judgment by confession was entered by the clerk of the court in vacation, without there being filed at the time any proof of the execution of the power of attorney to confess judgment. The judgment was set aside on the motion of the defendant, and the execution issued thereon was quashed. In that case it was queried whether the judgment was not void.

But while there may be some cases in which the judgment is absolutely null and void, such cases are rare: Freeman on Judgments, sec. 557. A judgment by confession, rendered without any statement, or rendered upon a defective statement, has been held to be valid, as between the parties: *In re Fuller*, 1 Saw. 243; *Chapin v. McLaren*, 105 Ind. 563; *Miller v. Earle*, 24 N. Y. 110; *Neusbaum v. Keim*, 24 Id. 325; *Harrison v. Gibbons*, 71 Id. 58. The validity of a judgment is not impaired, as between the parties thereto, because of defects in the statement upon which it is rendered: *Pond v. Davenport*, 44 Cal. 481; *Plummer v. Douglas*, 14 Iowa, 69; S. C., 81 Am. Dec. 456; *Bryan v. Miller*, 28 Mo. 32; S. C., 75 Am. Dec. 107; *Hov v. Dorscheimer*, 31 Mo. 349; *Miller v. Earle*, 24 N. Y. 110; *In re Fuller*, 1 Saw. 243.

A judgment by confession rendered upon a statement which is defective is not, as a general rule, regarded as void. It is erroneous, and may be set aside in a direct proceeding for that purpose, but it is voidable only; and so long as it stands unvacated, and apparently in full force, it cannot be attacked collaterally: *Richards v. McMillan*, 6 Cal. 419; S. C., 65 Am. Dec. 521; *Bur-*

Chatt v. Casaday, 16 Iowa, 342; *Sheldon v. Stryker*, 34 Barb. 116; S. C., 21 How. Pr. 329; *Read v. French*, 28 N. Y. 285; *Hopkins v. Howard*, 12 Tex. 7; *Pirie v. Hughes*, 43 Wis. 531. As to creditors, a judgment by confession on a statement which does not comply with the requirements of the statute is invalid, and may be set aside. While not absolutely void, it is, as to them, *prima facie*, fraudulent: *Pond v. Davenport*, 44 Cal. 481; *Chapin v. McLaren*, 145 Ind. 563; *Kennedy v. Lowe*, 9 Iowa, 590; *Bernard v. Douglas*, 10 Id. 370; *Bryan v. Miller*, 28 Mo. 32; S. C., 75 Am. Dec. 107; *How v. Dorecheimer*, 31 Mo. 349; *James v. Morey*, 2 Cow. 246; S. C., 14 Am. Dec. 475; *Norris v. Denton*, 30 Barb. 117; *Winnbrenner v. Edgerton*, 30 Id. 185; *McDonnell v. Daniels*, 38 Id. 143; *Bonnell v. Henry*, 13 How. Pr. 142; *Von Beck v. Shuman*, 13 Id. 472; *Ex parte Carroll*, 17 S. C. 446. And if the statement of facts out of which the indebtedness arose is false, or so grossly inaccurate as to mislead inquirers, the confession will be held void as to the creditors of the judgment debtor: *Kohn v. Meyer*, 19 Id. 190. And a judgment confessed for the purpose of defrauding creditors will be set aside as to judgment and execution creditors, although it will not be relieved against, so far as the defendant himself is concerned: *Shallcross v. Deats*, 43 N. J. L. 177.

CONFESSION OF JUDGMENT WITHOUT CREDITOR'S KNOWLEDGE or request is invalid as against subsequent attaching creditors: *Wilcoxon v. Burton*, 27 Cal. 223; S. C., 87 Am. Dec. 66. And such judgment will be vacated on the motion of the creditor: *Farmers' and Mechanics' Bank v. Mather*, 30 Iowa, 283. But it may be ratified by the creditors. And knowledge and consent by the creditor's attorney are sufficient: *Chapin v. McLaren*, 105 Ind. 563.

VOID AS TO PART. — Where part of the amount for which a judgment is confessed is improperly included in the judgment, the judgment will be void only as to that part, and valid as to the rest, provided there was no fraud in the confession: *Kern v. Chalfant*, 7 Minn. 393; *Wells v. Giesecke*, 27 Id. 478; *Davenport v. Wright*, 51 Pa. St. 292; Freeman on Judgments, sec. 545.

AUTHORITY TO ENTER JUDGMENT BY CONFESSION SHOULD BE STRICTLY PURSUED: *Chapin v. Thompson*, 20 Cal. 681; *Keith v. Kellogg*, 97 Ill. 147; *Grubbs v. Blum*, 62 Tex. 426.

STATEMENT FOR JUDGMENT BY CONFESSION should concisely set out the facts out of which the indebtedness arose: *Pond v. Davenport*, 44 Cal. 481; *Chappel v. Chappel*, 12 N. Y. 215; S. C., 64 Am. Dec. 496, note 501, where this subject is considered; Freeman on Judgments, sec. 549.

JUDGMENT MAY BE CONFESSED FOR MONEY NOT YET DUE, and to secure future advances: *Black v. Pattison*, 61 Miss. 599; *Mechanics' Bank v. Mayer*, 6 S. W. Rep. 237 (Sup. Ct. Mo., Dec. 1887); *Brinkerhoff v. Marvin*, 5 Johns. Ch. 320; *Truscott v. King*, 6 N. Y. 147; *Cook v. Whipple*, 55 Id. 150; S. C., 14 Am. Rep. 202; Freeman on Judgments, sec. 546. In *Baldwin v. Freydenhall*, 10 Ill. App. 106, however, it was held that, under the Illinois statute which authorizes the confession of judgment upon all debts due, a judgment by confession taken before the debt is due, is a nullity. See also *Spier v. Corll*, 33 Ohio St. 236. But where a power of attorney to confess judgment on a note authorizes a confession at any time after the date of the note, a judgment confessed before the maturity of the note will be valid: *Sherman v. Baddely*, 11 Ill. 622; *Adam v. Arnold*, 86 Id. 185. And where a power of attorney to confess judgment "at any time hereafter" is given, a judgment entered on the same day is valid: *Cummins v. Holmes*, 11 Ill. App. 158; *Thomas v. Mueller*, 106 Ill. 36.

JUDGMENT BY CONFESSION AGAINST MARRIED WOMAN. — This subject is fully discussed in the note to *Caldwell v. Waters*, 55 Am. Dec. 603 et seq.

PARTNER HAS NOT AUTHORITY TO CONFESS JUDGMENT AGAINST HIS FIRM, by virtue of his general power to act as agent for the partnership. A judgment confessed by one partner in the name of the firm is not valid as against the members of the firm who did not sign the confession: *Freeman on Judgments*, sec. 545; *Elliott v. Holbrook*, 33 Ala. 659; *Christy v. Sherman*, 10 Iowa, 535; *North v. Mudge*, 13 Id. 496; *Soper v. Fry*, 37 Mich. 236; *Stoutenburgh v. Vandenburg*, 7 How. Pr. 229; *Richardson v. Fuller*, 2 Or. 179; *Morgan v. Scott*, 12 Am. Dec. 35, note 37.

Nor is a judgment by confession of one of the partners, after the dissolution of the firm, binding upon the firm: *Canada Lead Mine Co. v. Steiwen*, 11 L. C. 433; *Conery v. Rotchford*, 30 La. Ann., pt. 1, 692. A judgment by confession of one of two defendants is void as to the defendant who did not confess judgment, and a sale of his property thereunder conveys no title to the purchaser: *Koechlept v. Hook's Lessees*, 10 Md. 173; S. C., 69 Am. Dec. 133. But a judgment by confession of one partner, though void as to his co-partners, is valid as against the partner who confessed it: *Freeman on Judgments*, sec. 557; *North v. Mudge*, 13 Iowa, 496; *Green v. Beale*, 2 Caines, 254; *Crane v. French*, 1 Wend. 311; *York Bank's Appeal*, 36 Pa. St. 458. But it was held in *Chapin v. Thompson*, 20 Cal. 681, that where two persons sign a confession of judgment against themselves and two others, the judgment entered thereon is void as to those not signing, and equally so as to those who sign.

PUBLIC OFFICER MAY CONFESS JUDGMENT for the amount due, when he is liable to be sued for services rendered for the public at his request: *Gere v. Supervisors of Cayuga Co.*, 7 How. Pr. 257.

TRUSTEE CANNOT CONFESS JUDGMENT so as to bind the trust estate: *Hunt v. Townsend*, 31 Md. 336; *Mallory v. Clark*, 20 How. Pr. 418.

AFFIDAVIT OF PARTY TO STATEMENT that "he believes the above statement of confession is true," is not sufficient, and a judgment entered upon such confession will be set aside: *Ingram v. Robbins*, 33 N. Y. 409. But the omission of a schedule referred to in the statement as being annexed will not render the judgment entered thereon invalid: *Clements v. Geros*, 1 Abb. App. 570. Nor will the omission of the notary's seal to the statement invalidate the judgment as between the immediate parties: *Thorp v. Platt*, 34 Iowa, 314. Nor will the omission by mistake of the notary's christian name in the jurat invalidate the judgment when assailed in a collateral action: *Grattan v. Matteson*, 54 Id. 229. In Texas, if the defendant appear under process and confess judgment, the judgment will be valid, whether there be any affidavit to the justness of the debt or not: *Flanagan v. Bruner*, 10 Tex. 257; *Gerald v. Burthee*, 29 Id. 202.

JUDGMENT BY CONFESSION FOR TORT is not authorized by the New York code: *Bontel v. Owens*, 2 Sand. 654; *Burkham v. Van Saun*, 14 Abb. Pr., N. S., 163. A judgment by confession must be for a certain and specified sum: *Nichols v. Hewitt*, 4 Johns. 423.

COURT MUST HAVE JURISDICTION of the subject-matter in order to render a valid judgment by confession: *Lanning v. Carpenter*, 23 Barb. 402. And where the law requires judgments to be signed by the judge, a judgment by confession, if not so signed, is void: *Chapin v. Thompson*, 20 Cal. 681.

JUDGMENT BY CONFESSION MUST BE ENTERED in fact, and an execution issued in advance of such entry is void: *Ling v. King*, 91 Ill. 571; *King v. French*, 2 Saw. 441. But where the clerk copied the statement and affidavit into the judgment book, and added the words: "Judgment entered April

14, A. D. 1874. Attest: J. H. Job, clerk," and indorsed the same words on the back of the statement, this was held to be a sufficient entry of the judgment: *Humboldt M. & M. Co. v. Terry*, 11 Nev. 240. And a judgment by confession entered in the clerk's office in vacation is valid: *Weinges v. Cash*, 15 S. C. 44.

AGENT MAY CONFESS JUDGMENT, if within his authority: *Parker v. Poole*, 12 Tex. 86. But the authority of an agent to confess a judgment for a partnership must be proved at the time of the entry of the judgment: *Conery v. Rotchford*, 34 La. Ann. 520. A judgment confessed in favor of an agent for the benefit of himself and his principal is not void, because the record does not disclose the trust upon which such agent holds the judgment, and parol evidence may be introduced to prove the trust: *Harris v. Alcock*, 10 Gill & J. 226; S. C., 32 Am. Dec. 158.

Where a warrant of attorney to confess judgment does not appear in the record, the court will presume that it was sufficient to justify the court in entering the judgment: *Gibboney v. Gibboney*, 2 Ill. App. 322. A judgment confessed for a party by an attorney, who appears without authority, is invalid: *Sherrard v. Nevius*, 2 Ind. 241; S. C., 52 Am. Dec. 508.

JUDGMENT BY CONFESSION, VALID IN STATE WHERE RENDERED, is valid in every other state, and entitled to full faith and credit like any other judgment: *Coleman v. Waters*, 13 W. Va. 278.

JUDGMENT BY CONFESSION WHEN COLLATERALLY ATTACKED is to be tried by the same rules as other judgments: *Allen v. Norton*, 6 Or. 344.

CITY AND COUNTY OF SAN FRANCISCO v. FULDE.

[37 CALIFORNIA, 349.]

ADVERSE POSSESSION, TO BE AVAILABLE AS DEFENSE, OR AS TITLE, MUST HAVE BEEN CONTINUOUS both in time and in interest. A party, in order to make up five years of adverse possession, cannot add to his own possession that of those who preceded him, when he did not enter into possession under or through them.

ASSERTION OF RIGHT OF POSSESSION, WHETHER BY WORDS OR BY ACTION, is not the equivalent of possession in fact for the purposes of the statute of limitations. If the continuity of possession is broken by fraud or a wrongful entry, the protection of the statute is lost.

WHERE DEFENDANT CLAIMING BENEFIT OF STATUTE OF LIMITATIONS HAS NOT BEEN IN POSSESSION five years, but seeks to add the possession of his predecessor to that of his own, his predecessor will be deemed to have held in subordination to the true title, unless he shows a privity between himself and his predecessor; and if he does not show such privity, he cannot dispute this presumption, and show that his predecessor did, in fact, hold adversely.

WHERE DEFENDANT IN EJECTMENT PLEADS FIVE YEARS' ADVERSE POSSESSION, and the parties stipulate that the plaintiff never was in possession, but the stipulation admits title to have been in the plaintiff, the stipulation will be construed as having reference to actual possession.

EJECTMENT for a lot in the city of San Francisco. The facts are stated in the opinion.

J. M. Seawell, for the appellants.

H. M. Hastings, for the respondent.

By Court, RHODES, J. It appears from the evidence that McDonald took possession of the lot in the latter part of the year 1858, or the beginning of 1859; that Hill, his tenant, occupied the lot from that time until his death, in 1861; that thereafter McDonald conveyed the lot to Calderwood in 1862; that at that time Callachan was in possession, but it does not appear that he entered under McDonald or Calderwood; that Calderwood brought suit against Callachan, in a justice's court, to recover possession; that judgment was rendered in the county court, on appeal, for Calderwood, and under the writ of restitution, July 29, 1863, Calderwood was placed in possession; and that he, his grantees, and Fulde, their tenant, have ever since that time occupied the lot. This action was commenced August 17, 1865. The plaintiff had judgment.

This lot, among other property, was granted to the city for the term of ninety-nine years by the act of March 26, 1851, for the disposition of beach and water lots; and as the title to the lot was in issue in this action, the judgment must stand, unless the defendants made out title by adverse possession. The defendants contend that they can defeat the action if they can show an adverse possession, continuous in point of time, for the period of five years, though such possession was held by several persons successively, but without any privity; in other words, that, in order to make up the five years of adverse possession, they are entitled to add to their own possession that of those who preceded them, although they, the defendants, did not enter into possession under or through their predecessors. This position cannot be sustained upon any proper construction of the statute of limitations. In *Arrington v. Liscom*, 34 Cal. 365, it is held that the adverse possession for the period described by the statute not only bars the remedy, but extinguishes the right of the party holding the title. See also cases there cited, and *Cannon v. Stockmon*, 36 Cal. 535 [95 Am. Dec. 205]. As such adverse possession is the means by which the former title is extinguished and a new one created, those means must necessarily proceed from the person in whom the better title vests; that is to say, his adverse possession alone, or the adverse possession of him and those through whom he claims, and under whom he entered, must fill the statutory period. Adverse possession, to be avail-

able as a defense or as a title, must have been continuous both in time and in interest.

It is urged that the possession of McDonald and his grantees was continuous, as Calderwood continued to assert his right to the possession, and commenced an action and obtained a judgment for the possession; and it is said that if such possession is not continuous within the meaning of the decisions, it is in the power of any one having the physical ability, by a forcible entry upon and detention of the premises, to break the continuity of possession. The assertion of the right of possession, whether by words or by an action, is not the equivalent of possession in fact for the purposes of the statute of limitations. It makes no difference, in respect to the operation of the statute, whether the adverse possession commenced or was terminated either peaceably or forcibly, and as the adverse possession, when continued during the whole period of the statute, ripens into a title or constitutes a perfect defense, though it was initiated by force or fraud, so such possession may be interrupted by the same means by which it was acquired. Had the plaintiff, instead of Callachan, forcibly entered, Calderwood could have recovered the possession in an action of forcible entry and detainer; and if the actual possession of the plaintiff thus acquired and held, when added to that of McDonald and his grantees, would have made up the full period of five years, we do not think the latter would seriously contend that they could have made a successful defense to this action on the ground of adverse possession. It makes no difference by whom or in what manner the continuity of the adverse possession is broken, so only that it is broken. The statute protects only such adverse possession as has been continuous in fact, both as to time and interest, during the prescribed period, and if such continuity is broken, it is not restored by showing that it was interrupted by a wrongful entry.

In many cases in which the defendant pleads, as in this case, that neither the plaintiff, his ancestor, predecessor, nor grantor were seised or possessed of the premises in controversy within five years before the commencement of the action, counsel seem to have overlooked the ninth section of the act, which provides that "the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time prescribed by law, and the occupation of such premises by any other person shall be deemed to have been

under and in subordination to the legal title, unless it appear that such premises have been held and possessed adversely to such legal title for five years before the commencement of such action." Under those provisions, the person who preceded the defendants in the possession, but held for less than five years, will be deemed to have held in subordination to the true title, unless there is a privity between him and the defendants, in which case the possession of the former becomes the possession of the latter, both possessions being referred to the same entry. The defendant cannot dispute this presumption, and show that such person did, in fact, hold adversely; because the defendant, not claiming under him, is not entitled to litigate the question as to the capacity in which he held; because the possession of each is distinct, and cannot constitute one adverse possession, for they are referable to different entries; and because, as the defendant merely succeeds the former possessor, without privity, there may be an immediate succession of possessions, but not a continuity of possession.

This doctrine is also sustained by authority. In *Melvin v. Proprietors of Locks etc.*, 5 Met. 32 [38 Am. Dec. 384], it is said: "It is a principle well established that when several persons enter on land in succession, the several possessions cannot be tacked so as to make a continuity of possession, unless there is a privity of estate, or the several titles are connected. Whenever one quits the possession, the seisin of the true owner is restored, and an entry, afterwards, by another, wrongfully, constitutes a new disseisin." To the same effect is *Brandt v. Ogden*, 1 Johns. 158; and see also *Ward v. Bartholomew*, 6 Pick. 410; *Wade v. Lindsey*, 6 Met. 407; *Doe v. Campbell*, 10 Johns. 475; *Jackson v. Leonard*, 9 Cow. 653; *Overfield v. Christie*, 7 Serg. & R. 173; *Moore v. Small*, 9 Pa. St. 194; *Mercer v. Watson*, 1 Watts, 330; *McCoy v. Trustees of Dickenson*, 5 Serg. & R. 254; Angell on Limitations, sec. 414.

There are some cases cited by the defendants that hold the contrary doctrine; but in our opinion they are as far from the true line as is *Potts v. Gilbert*, 3 Wash. C. C. 475, in which it is held that the last possessor cannot tack the possessions of his predecessors, even if there had been conveyances, because they had no title to convey.

The stipulation "that the plaintiff was never in the possession of said premises," has reference to actual possession, as is apparent from another branch of the stipulation, which admits

train, knocking him senseless; that the cars ran over his right leg, crushing it below the knee in such a manner as to render amputation necessary.

A witness by the name of Clark testified that he was at the plaintiff's house at the time, and saw him get safely on the car, and ride there at least ten yards before the cars passed out of his sight. That it was 150 yards, by actual measurement, from the place where the plaintiff got onto the car to the place where he fell or was forced off.

A Mrs. Moses also testified that she saw the plaintiff swing himself onto the car in the manner stated, and was positive that he reached the platform in safety; that she also saw some person come out of the car onto the platform, after the plaintiff had reached it.

It also appeared by the testimony that, soon after the accident, the conductor visited the plaintiff at his house, to which he had been removed, and that the plaintiff pointed him out as the man who pushed him off the car, and the conductor denied that he did so. It also appeared that the conductor had received strict orders from the defendant to keep boys off the train, and that he had a man at the back end of the train, with a club, for that purpose. Also, that the conductor, according to his own statement, ordered the plaintiff, sharply, to get off the cars, telling him he could not be allowed to ride, and that he put his hand on the plaintiff's shoulder at the same time.

A witness, who was standing upon the platform of the hindmost car and looking forward, saw the plaintiff fall, and also the hands of some person "coming back" from the person of the plaintiff as he fell. A witness, who saw the plaintiff in the act of falling from the car, testified that he fell forward, — that is to say, with his face toward the ground.

The foregoing is the substance of the testimony, so far as it illustrates the points made by the defendant on the motion for a nonsuit.

We think the testimony tends to show that the plaintiff did not fall in getting upon the car, and consequently did not receive his injury by reason of his wrongful, careless, and negligent attempt to get upon the car, as a proximate cause. He rode upon the car a distance of nearly 150 yards, not merely hanging to it, but standing in safety upon the platform.

Being thus upon the car, did he fall off accidentally, or in

attempting to leave voluntarily, or in getting off in obedience to the command of the conductor merely? or was he pushed off by the conductor? There is no pretense for saying that he fell off accidentally, or that he undertook to get off voluntarily. He must, then, have undertaken to get off because he was told that he could not ride, and was ordered to do so by the conductor, with a show of force; or he must have been with actual force pushed off by the conductor. Upon either hypothesis, we think, the plaintiff should not have been non-suited.

Had the plaintiff been a man, or of mature age and discretion, it might be said, judicially, by the court, that, having jumped off the cars merely because he was commanded to do so, he had no one to blame but himself for the injury he sustained; but being a boy only sixteen years of age, we think it should have been left to the jury to say whether in his case the sharp command of the conductor, accompanied by a show of force, did not, under all the circumstances, amount to compulsion.

Where a boy ten years of age was upon the platform of a street or horse car, under circumstances very similar to those of the present case, and was ordered to get off by the driver, without stopping the car, and did so, and fell, and was run over by the car, the court said: "If the plaintiff had been a person of mature age, the mere words of the driver could not have been regarded as equivalent to a forcible ejection of the plaintiff from the car, at a time when it was dangerous to leave it. For such a person might have exercised his own judgment as to the peril he might incur in attempting to obey the order. But the plaintiff was a child of about ten years of age. His obedience would be naturally expected, without regard to the risk he might incur; and in respect to a child so young, the command would be equivalent to compulsion": *Lovett v. Salem etc. R. R. Co.*, 9 Allen, 561. If this be sound doctrine, and we see no reason to doubt, can there be any period in childhood of which it can be said by the court, judicially, or as a matter of law, that the judgment is so far matured as to enable a child to so far withstand the positive and menacing command of one in authority as to cast, in whole or in part, the responsibility of obedience upon the child, if his obedience results in personal injury to himself? There may be moral as well as physical compulsion, and the former may prove as effectual as the latter; how, then, is one who resorts to the

former less culpable than one who employs the latter? Or how can one, who finds himself unable to resist the former, be held more responsible for the consequences than when he yields, from necessity, to the latter? Can his obedience in the former case be considered the result of his own will, any more than his ejection in the latter? If, as the testimony tends to show, the conductor sharply ordered the plaintiff to get off the cars, telling him that he could not ride, at the same time putting his hand upon his shoulder, as if to enforce obedience, and the boy then jumped, without waiting for further actual force, or resisting until thrust off by the superior strength of the conductor, can we say judicially that his act was in any degree voluntary? The tone, manner, and whole bearing of the conductor may have satisfied the plaintiff that force would be used. If so, was not such a demonstration on the part of the conductor equivalent to actual and superior force? We have no doubt that in such cases a show or demonstration of force, sufficient to impress a reasonable person with the belief that it will be employed, must be held to be the equivalent of actual force. The danger of sustaining personal injury is much greater where a person is ejected by the use of actual force than when he is ejected under circumstances which permit the exercise of some care on his part. It would be a rigid rule to require a person to subject himself to such extra hazard, after it has become morally certain that actual force will be used, in order to free himself from all responsibility in respect to consequences, and fasten it upon his adversary.

Without undertaking to lay down a general rule, we think that, under all the circumstances of this case, taking in consideration the youth of the plaintiff, the question of compulsion should have been allowed to go to the jury, even without taking into account the positive testimony of the plaintiff that he was forcibly pushed or knocked off the cars. Without his testimony there was evidence of conduct on the part of the conductor which a jury might reasonably hold to be equivalent to compulsion by actual force. Although the plaintiff was wrongfully upon the cars, the conductor was bound to exercise reasonable care and prudence in removing him. The rule that the plaintiff cannot recover if his own wrong, as well as that of the defendant, has conduced to the injury which he has sustained, is confined to cases where his wrong or negligence has immediately or proximately contributed to the result. We had occasion to consider this question in the case of *Needham*

v. *San Francisco etc. R. R. Co.*, 37 Cal. 409, and we there reached the conclusion just stated. If the plaintiff be in the wrong, yet if his wrong or negligence is remote,—that is, does not immediately accompany the transaction from which his injury resulted,—the defendant cannot excuse himself on the score of mutuality, nor absolve himself from his obligation to exercise reasonable care and prudence in what he may do.

In getting upon the train while it was going at a speed of ten miles an hour, the plaintiff was negligent, even though he attempted to do so as a passenger, with the intention to pay a fare; and if he had failed in achieving a safe landing, and had fallen in the attempt, no blame or liability could have been charged to the account of the defendant. If, as was doubtless the case, he got upon the car—as boys sometimes will—with intent to enjoy the stolen pleasure of a free ride to Front Street, he came as a trespasser, and doubtless the defendant, acting contemporaneously, could have legally prevented him from getting on the car by the use of such force as may have been requisite, without becoming legally responsible or morally to blame for any injury which he might have sustained. And if he succeeded in getting upon the car without opposition, the defendant doubtless had the right to eject him by force, if force was necessary; but it was bound to exercise the right with ordinary care and prudence, and it had no right to eject him under circumstances which would endanger his personal safety. If the train was going at a speed which would render it unsafe for him to leave the car, it was the duty of the defendant, if determined to put him off, to stop, or “slow up” sufficiently to allow him to descend in safety by the exercise of reasonable care and prudence on his part. Although his entry upon the car was a trespass, yet if it was an accomplished fact before the conductor attempted to interfere, his entry did not directly conduce to the injury which he sustained, but was, in the sense of the rule under consideration, only its remote cause, and did not, therefore, absolve the conductor from the duty of observing reasonable care and prudence in putting him off the train.

The ground upon which the court below placed its judgment—that the act complained of was the wanton and malicious act of a servant, acting without the scope of his employment, for which the master cannot be held responsible—remains to be considered.

As to the general rule upon that subject there can be no

doubt. If the act of the conductor, in putting plaintiff off the car, was a wanton and malicious act, committed out of the course of his agency, the defendant cannot be held responsible for the manner in which he did it, unless, however, the defendant expressly authorized the act. Was the act, then, either within the authority of the conductor, arising from his general relation to the defendant,—or if not, within any express authority shown by the testimony? If either, the plaintiff is not, on the score of remedy, confined to the conductor, but may look to his master. And in this respect we cannot assent to the conclusion which was reached by the court below. In our judgment, the act was within the scope of the conductor's general authority; and the testimony also shows that, aside from his general authority, he had special authority for what he did; and hence, upon both grounds, the defendant must be held responsible for the manner in which he acted. The truth of the first proposition is established by that which follows from what has already been said as to the authority and power of the conductor to put the plaintiff off the cars. We have said that, under the circumstances of this case, he had authority to prevent the plaintiff from getting upon the cars in the first instance, and to put him off in the second. This authority was incident to his position as chief officer of the train, and necessarily came, by implication, from defendant, with his appointment to the place. It is the duty of the defendant, arising from the nature of its business, to admit into its cars all persons who seek admission as passengers, and are willing and offer to pay legal fare, provided they are fit persons to be admitted, and there is room for their accommodation. To itself and its stockholders it owes the contrary duty of excluding all persons who do not come as passengers, or are not fit persons to be admitted; and the conductor is charged, by virtue of his position, with the performance of both, and is necessarily vested with the requisite power. It cannot be said that he is acting outside of his authority while he is engaged in the performance of either duty; on the contrary, he is acting strictly within the scope of his employment. In a conductor's excluding a person who is not entitled to be admitted or to remain in the cars, the relation of master and servant is as clear and apparent as it is in his receiving and providing for those who are entitled to admission. The relation being established, all else is mode and manner, and as to that, the master is responsible.

But if there was any doubt as to the act in question being within the scope of the conductor's employment, when considered by the light of his general relation to the defendant, it is dispersed by the testimony in relation to the special instructions which he received from the defendant in relation to boys trespassing upon the cars.

There is nothing in the case of *Turner v. North Beach etc. R. R. Co.*, 34 Cal. 594, which runs counter to this view.

Judgment reversed, and new trial granted.

LIABILITY OF RAILROAD COMPANY FOR NEGLIGENCE OF ITS SERVANTS: See *Toledo etc. R. R. Co. v. Harmon*, 95 Am. Dec. 489, note 494, where other cases are collected; *Sheridan v. Brooklyn & N. R. R. Co.*, 93 Id. 490, note 494.

SICK PERSON OR CHILD SHOULD HAVE MORE CARE EXERCISED TOWARD HIM by carrier than person in good health and under no disability: *Sheridan v. Brooklyn & N. R. R. Co.*, 93 Am. Dec. 490, note 494, where other cases are collected.

CONDUCTOR OF RAILWAY TRAIN, IN REMOVING FROM CARS PERSONS not lawfully entitled to remain in them, is acting within the scope of his authority, and the company is responsible to persons injured by his wrongful or negligent acts: See *Toledo etc. R. R. Co. v. Harmon*, 95 Am. Dec. 489, note 494; *New Orleans etc. R. R. Co. v. Harrison*, 48 Miss. 118; S. C., 12 Am. Rep. 358; *Perkins v. Missouri, K., & T. R. R.*, 55 Mo. 213; *Rounds v. Delaware, L., & W. R. R. Co.*, 3 Hun, 334, all citing the principal case. But if the conductor acts wantonly and maliciously, out of the course of his agency, the company is not responsible for his act, unless it expressly authorized it: *Goddard v. Grand Trunk Railway*, 57 Me. 255, also citing the principal case.

RULE RELEASING DEFENDANT FROM RESPONSIBILITY FOR DAMAGES BECAUSE OF PLAINTIFF'S NEGLIGENCE is limited to cases where the act or omission of the plaintiff was the proximate cause of the injury: See *Wilnot v. Howard*, 94 Am. Dec. 338, note 345, where other cases are collected; *Flynn v. San Francisco & S. J. R. R. Co.*, 40 Cal. 19, citing the principal case. The words "immediate" and "proximate" are used indiscriminately to express the same meaning: *Longabaugh v. Virginia City & T. R. R. Co.*, 9 Nev. 294, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Baker v. Kinsey*, 38 Cal. 634, to the point that if the servant can justify his act to his master, as being within the line of his duty to him, the act is the act of the master, and not otherwise.

THE PRINCIPAL CASE AGAIN CAME BEFORE THE COURT, and is reported in 39 Cal. 587, where it was decided that in an action for damages for injuries sustained by a forcible ejection from a railroad car while in motion, proof that the conductor ordered the plaintiff to get off, and accompanied such order with a show or demonstration of force sufficient to impress him with the belief that it would be employed, and thereby compelling him to jump from the car, is equivalent to proof of the employment of actual force.

WALLS v. WALKER.

[37 CALIFORNIA, 424.]

WHERE CHARGES IN FAVOR OF ADMINISTRATOR IN HIS ANNUAL ACCOUNT HAVE BEEN REJECTED, by reason of his failure to produce the necessary vouchers required by statute, he may include the charges in a subsequent account, and have them allowed on production of the vouchers.

SETTLEMENT OF ANNUAL ACCOUNT OF ADMINISTRATOR IS NOT CONCLUSIVE, even as against the heirs, legatees, and creditors, except as to such items as are included in the account, and actually passed upon by the probate court.

FUNDS IN HANDS OF ADMINISTRATOR, NOT NEEDED TO PAY EXPENSES OF FUNERAL and last sickness of the intestate, and the allowance to his family, should be applied to the payment of debts, upon an order obtained by the administrator at his next annual settlement.

ADMINISTRATOR WILL BE CHARGED WITH INTEREST, where he uses the funds of the estate in his private business, or retains them in his hands for an unreasonable length of time, to the prejudice of the heirs and creditors. He must prosecute the settlement of the estate with all reasonable diligence.

UNDER LAWS OF CALIFORNIA, ADMINISTRATOR IS VESTED with right to possession of the real estate of his intestate, as well as the personal, and his duties and liabilities in respect thereto are of the same general character.

ADMINISTRATOR WHO OCCUPIES AND USES REAL ESTATE of his intestate becomes the tenant of the estate, and liable for the value of its use and occupation; and if he makes a profit, he is liable for that also. If he sustains a loss, the loss is his; he must, in any event, account for the rental value of the land.

ADMINISTRATOR CANNOT BE CHARGED WITH RENTAL VALUE of land of the estate after a foreclosure sale of the premises by the sheriff. From that time, the purchaser at the sale is entitled to the value of the use and occupation.

The opinion states the case.

William S. Wells, for the administrator.

George A. Lamont and Joseph McKenna, for the creditors.

By Court, SANDERSON, J. This is a contest between an administrator and creditors, in relation to the settlement of an annual account of the former. Both parties were dissatisfied with the result in the probate court, and have appealed. The appeal by the creditors will be first considered.

The case shows that at a former annual accounting, two items contained in the present account—one for cash paid the register and receiver of the land-office at San Francisco, amounting to the sum of \$37.16, and the other for cash paid to an attorney at Washington, for professional services rendered in the interest of the estate, amounting to the sum of

\$25—were rejected, or not allowed by the court, not upon the ground, however, that they were not legal charges against the estate, but because the administrator was unable or failed to produce the vouchers required by section 231 of the statute by which the settlement of estates of deceased persons is regulated; that at the present accounting the administrator produced the requisite vouchers, and the items in question were allowed by the court. This allowance constitutes the first error assigned, it being claimed that the result of the former accounting was conclusive against the administrator as to such items.

In support of this view, section 237 of the statute is cited, and also the case of *Clarke v. Perry*, 5 Cal. 58; but we fail to see how the point is sustained by either. Section 237 prescribes the effect of a settlement of an administrator's account as against "all persons in any way interested in the estate"; viz., heirs, legatees, and creditors. We find nothing in this provision of the statute which precludes the administrator from bringing forward, in a succeeding annual account, or in his final account, such charges in his favor as may have been refused allowance at some former accounting, merely because the administrator failed, from any cause, to produce the technical proof required by the statute. On the contrary, the settlement of an annual account is not conclusive, even as against the heirs, legatees, and creditors, except as to such matters as were actually included in such former account, and directly passed upon by the court: Sec. 235. The fact that the heirs, legatees, and creditors are thus expressly permitted to contest matters not included and passed upon in any former account, necessarily implies that the administrator is not precluded from going behind a former account, and bringing forward charges which, through inadvertence or oversight, may have been omitted. Charges admitted to be legal, but not allowed, merely because not proved in the appointed mode, certainly do not stand upon less meritorious grounds, and if the administrator may go behind a former account for the purpose of bringing forward charges of the former character, by parity he may do the like in respect to the latter; and we find nothing in the statute which expressly precludes him from doing so.

The only remaining error assigned by the creditors presents the question whether the administrator ought to be charged interest upon certain funds belonging to the estate, which, as

is claimed, were retained in his hands an unreasonable length of time, and used in his private business, and therefore not applied to the payment of the debts against the estate as soon as they might and ought to have been. We find ourselves, however, unable to reach the merits of that question, by reason of the failure of the appellant to furnish us with the necessary facts.

The case merely shows that letters of administration were issued in May, 1863; that in September following, the administrator filed a report and account of sales of personal property, from which it appears he thereby received the sum of \$5,982.48; that in May, 1864, at his first annual accounting, he had in hand the sum of \$4,420.85; that in May, 1865, at his second annual accounting, he had the sum of \$3,284.06; and in May, 1866, at his last annual accounting, he had the sum of \$5,097.92. The present account was filed on the 7th of June, 1867. Why the estate has been kept so long in the hands of the administrator — nearly six years — and is still unsettled, the record fails to show. None of the annual accounts of the administrator, except the one under review, have been brought up; nor does the record contain any other matter by which this delay can be explained; nor does it appear, in any form, what was or has been the condition of the estate during all this time, or why the administrator has kept these funds in his hands, and not, by leave of the court, applied them in satisfaction of claims against the estate. The record fails to show either the value of the estate or the amount of the claims against it. If the estate is not insolvent, it is not perceived how the creditors can be interested in this question of interest. If it is solvent, the heirs would seem to be the only persons interested in pressing that question, for the creditors would get their money in either event. It is suggested in the brief of counsel for the creditors that the estate is insolvent, but that such is the fact nowhere appears in the record.

The only light thrown upon the question of interest is found in the testimony of the administrator and one Frisbie as to how the money was kept and used; from which it appears that it was kept by the former on general deposit with the latter, but it does not satisfactorily appear whether the administrator used any portion of it in his private business, or in any way derived any benefit from it. The court found, however, that he did not use it in his private business, and received no

benefit or profit from it, and there is nothing in the record which would justify us in disturbing this finding.

The only other ground upon which it is claimed that he ought to be charged with interest is the length of time during which he had the money in his possession without applying it to the payment of the debts against the estate, which time counsel assert to have been unreasonable. We say assert, because there is nothing in the record showing whether the administrator neglected his duty in that respect or not. When an administrator finds himself with funds not needed for the purpose of paying the expenses of the funeral and last sickness of the deceased, the allowance to his family, and the necessary current and prospective expenses of administration, he ought, as counsel contend, to report the fact to the court at his next annual settlement, and obtain an order to apply it in payment of debts: Sec. 243; but he is at all times entitled to retain in his hands ample funds to meet the claims and expenses above mentioned: Sec. 242. But whether this administrator has failed in his duty in this respect, it is impossible for us to say, upon the case which counsel have brought here. We cannot presume, from the mere length of time in which he held this money in hand, that he could, and therefore ought to have applied it to the payment of claims against the estate. The facts and circumstances, in view of which we might have been able to determine that question, are not in the record. Neither the testimony nor the findings disclose any facts or circumstances in explanation of the question. The court below has impliedly found that the administrator did not fail in his duty in that respect, and upon the record we cannot say that his finding was wrong. From aught that appears, it may have been prudent, if not absolutely necessary, for him to retain this money in his hands to meet the exigencies of administration. If not, the creditors should have made a showing to that effect, and brought it here, which they have failed to do. From the mere fact that he had at various times large sums in hand, we cannot say that he failed in the performance of his duty to the estate, especially in view of the fact that the probate court, which must have had a better knowledge of the matter than we can gather from the meager record which has been brought here, has held that he did not.

The abstract proposition, for which counsel contend in this connection, that an administrator who uses the funds of the estate in his private business, or retains them in his hands for

an unreasonable length of time, to the prejudice of the heirs and creditors, will be charged interest, is well settled. He cannot be allowed to make any profit out of the estate, or retain its funds in his possession for an unreasonable time. He must prosecute the settlement of the estate with all reasonable diligence, which requires him, whenever he finds himself with funds not needed for the purposes already suggested, to apply to the court at his next annual accounting for an order of distribution, as provided in section 243 of the statute: Secs. 217, 220; *Mosley v. Ward*, 11 Ves. 581; *Ogilvie v. Ogilvie*, 1 Bradf. 356; *Griswold v. Chandler*, 5 N. H. 492; *Benson v. Bruce*, 4 Desaus. Eq. 463; *English v. Harvey*, 2 Rawle, 305; *Robinett's Appeal*, 36 Pa. St. 174.

The objection made by the administrator upon his appeal to the order of the court below, settling the account, relates to a year's rent of about 225 acres of land belonging to the estate, with which he was charged, claiming that he was not chargeable therewith.

The case shows, in relation to this point, that, during the year 1866, the administrator cultivated the land in question, and raised thereon a crop of wheat; that the crop cost him \$4,423.90; that he sold it for \$4,145.63,—which was a reasonable price for that year,—losing, thereby, the sum of \$278.27; that in the cultivation of this land he used the same care and skill which he exercised in the cultivation of his own land during the same year; that the rental value of the land during that year was \$4.50 per acre, and that he could have rented it at \$4 per acre; that the customary mode of renting land in that vicinity was for a share of the crop; that in the month of June of that year the land was sold by the sheriff, under the foreclosure of certain mortgages executed by the intestate in his lifetime; that the administrator was engaged in harvesting the crop at the time the sale was made; that no redemption was made, and that at the expiration of six months the purchasers obtained their deeds. Upon these facts the probate court charged the administrator rent at the rate of four dollars per acre for the whole year.

It is claimed on the part of the administrator,—1. That, having received no rent, and, without fault on his part, derived no profit from the use of the land, he is not legally chargeable for rent or use; 2. That, if liable at all, he is chargeable for use only up to the date of the mortgage sale, at which time he became liable for use to the purchasers.

Under the laws of this state, an administrator is vested with the right to the possession of the real estate of his intestate, as well as the personal, and his duties and liabilities in respect thereto are therefore of the same general character. As we have seen, if he puts the personal estate to his own private use, he is chargeable with the value of its use, or with the actual profits, if any, which the administrator has made by its use, at the election of the parties interested in the distribution of the estate; and if a loss has ensued thereby, he is not only not entitled to be made whole, but is, notwithstanding, liable for use, for to so use the property of the estate is a breach of his trust, and the profits which he may have made are the earnings of the estate, and must go with it. Under the statute of this state, it follows, by parity of reason, that an administrator is to be held to a like diligence in the management of the real estate and its issues, and in respect thereto to a like measure of accountability. If he occupies and uses it, he cannot be allowed to make any profit thereby, and, in any event, must account to the probate court for its rental value. If he occupies and uses it, he becomes at least the tenant of the estate, liable, in any event, for the value of its use and occupation, and if he makes a profit, he becomes liable for that also at the election of the parties in interest. Such is the law of his relation. If, in this case, the administrator sustained a loss, the loss is his, and the hardship is no greater than a like result in the case of any other tenant: Secs. 73, 114, 216.

But while the probate court did not err, for the reasons suggested, in charging the administrator for the value of the use and occupation, we think it erred in holding him liable for such use and occupation after the sale of the premises by the sheriff. From that time the purchaser at the sale became entitled to the value of the use and occupation, as provided in section 236 of the Practice Act. After that time, the estate and the parties interested therein had no claim to the value of the use and occupation: *McDevitt v. Sullivan*, 8 Cal. 592; *Harris v. Reynolds*, 13 Id. 514 [73 Am. Dec. 600]; *Kline v. Chase*, 17 Id. 596; *Knight v. Truett*, 18 Id. 113. And the administrator, if he used and occupied the premises thereafter, was bound to account to the purchaser for the value of the use and occupation.

The settlement of the account is affirmed, except as to the item of rent; as to that item, it is opened, and the court below

directed to apportion the value of the use and occupation in accordance with the rule announced in this opinion. The costs of both appeals must be taxed against the creditors.

So ordered, and *remittitur* allowed forthwith.

EFFECT OF RES JUDICATA OF ANNUAL SETTLEMENTS OF EXECUTORS OR ADMINISTRATORS: *Picot v. Biddle*, 86 Am. Dec. 134, and extended note 143.

RIGHT OF EXECUTOR OR ADMINISTRATOR TO POSSESSION AND CONTROL OF DECEDENT'S LANDS: *Carnall v. Wilson*, 76 Am. Dec. 351.

ADMINISTRATOR IS NOT CHARGEABLE, ORDINARILY, WITH RENTS OF REAL ESTATE which accrued during his administration: *Rubottom v. Morrow*, 87 Am. Dec. 324; nor for rents received by him from lands which did not belong to the decedent, but which were improperly included in the inventory and appraisement: *Cameron v. Cameron*, 82 Id. 652; but profits made by him belong to the estate: *Moseley v. Lane*, 62 Id. 752; and he is held liable for investments made: *Matter of Knight*, 73 Id. 531, and note 533; but is not chargeable with interest on funds paid over in a reasonable time: *Lynn's Appeal*, 72 Id. 721, and note 723.

WHEN EXECUTOR OR ADMINISTRATOR SHOULD BE CHARGED WITH INTEREST.—Interest on assets is not chargeable against executors and administrators as of course, but may be so charged as the circumstances of the particular case may warrant: See *Watts's Appeal*, 31 Pa. St. 62; *Madden v. Madden*, 27 Mo. 544; *Peale v. Hickie*, 9 Gratt. 437; *Hester v. Hester*, 3 Ired. Eq. 9; *Dexter v. Arnold*, 3 Mason, 284. Generally speaking, if the exigencies of the estate require an administrator to keep money by him, if he has not unreasonably delayed a settlement of his accounts, and has made promptly a just and true exhibition of the receipts and disbursements, he is not chargeable with interest on any accidental amount he may have had in his hands, and upon which he received no interest: *Cannon v. Apperson*, 14 Lea, 553, 580; *Pickens v. Miller*, 83 N. C. 543; *Mitche v. Cox*, 5 Johns. Ch. 448; *Hasler v. Hasler*, 1 Bradf. 248. On the other hand, in all cases where the administrator, without any just reason or excuse, retains the money in his own hands, unemployed, when it ought to be paid over, in all cases where he receives interest for money which belongs to the estate, and in all cases where he applies money belonging to the estate to his own use, he ought to be charged with interest, either simple or compound, according to the circumstances: *Griswold v. Chandler*, 5 N. H. 497; *Mathes v. Bennett*, 21 Id. 199; *Lund v. Lund*, 41 Id. 359; *Bartlett v. Fitts*, 59 Id. 502; *Turney v. Williams*, 7 Yerg. 173, 213; *Cooch v. Irwin*, 7 Ohio St. 22; *Pearson v. Darrington*, 32 Ala. 227; *Stearns v. Brown*, 1 Pick. 530; *Garniss v. Gardner*, 1 Edw. Ch. 128; *Gray v. Thompson*, 1 Johns. Ch. 82; *Smithers v. Hooper*, 23 Md. 278; *Lyles v. Hatton*, 6 Gill & J. 122; *Oldham v. Collins*, 4 J. J. Marsh. 49; *Chase v. Lockerman*, 11 Gill & J. 185; S. C., 35 Am. Dec. 277.

It is well settled, as a general rule, that an executor or administrator will be charged with interest, where he has been guilty of inexcusable laches and unreasonable delay in retaining a fund in his hands, after he ought to pay it over to claimants, or account to the court: *Smithers v. Hooper*, 23 Md. 285; *Rowan v. Kirkpatrick*, 14 Ill. 1; *Wright v. Grovier*, 25 Mich. 428; *Gray v. Thompson*, 1 Johns. Ch. 82; *Matter of Mapes*, 5 Demarest, 446. He is chargeable with interest in such case, not on the ground that he has used the money, but as compensation to those entitled to it, for the damage occasioned

by the delay: *Eubank v. Clark*, 78 Ala. 73; but if those interested in the estate have been equally guilty of laches in protracting a settlement, interest is not chargeable: *Forward v. Forward*, 6 Allen, 494; and see *Riddle v. Riddle*, 5 Rich. Eq. 31. So if there were circumstances rendering it unsafe or injudicious for an executor or administrator to proceed to a settlement, and to a distribution of the assets, — as, if suits were pending, or there was just reason to anticipate the commencement of suits, or if there was any other necessity upon which in good faith he acted in keeping the money, — he should not be made liable for interest: *Clark v. Knox*, 70 Ala. 607, 618; as, where there is a contest over the will, the executor should not be charged interest on moneys retained by him to meet the expenses of the contest, when the amount so retained is reasonable and proper: *Booker v. Armstrong*, 4 S. W. Rep. 727 (Mo.); *Johnson v. Holifield*, 82 Ala. 123. What time is an unreasonable delay in making settlement and distribution is, therefore, said to depend upon the circumstances of each case, — that is, on the situation and condition of the estate, the complication of its affairs, and the obstacles to an earlier settlement and distribution: *Eubank v. Clark*, 78 Id. 73; *Clark v. Hughes*, 71 Id. 163; and see *Bitzer v. Hahn*, 14 Serg. & R. 232, 239; *Young v. Brush*, 38 Barb. 294; *Brandon v. Hoggatt*, 32 Miss. 340; *Dortch v. Dortch*, 71 N. C. 224. But having collected assets, it is the duty of the executor or administrator to use due diligence to keep them invested until he can distribute them as the will of the testator or the law requires: *De Peyster v. Clarkson*, 2 Wend. 77; *Dosten v. Arnold*, 60 Ga. 316; and if he fails to invest funds that he might have invested, he is chargeable with interest on them: *Eppinger v. Canepa*, 20 Fla. 262. And in the absence of special circumstances, six months from the time the money was received are usually allowed as a reasonable time for making the investments: *Duncomb v. Duncomb*, 1 Johns. Ch. 508; *Halstead v. Hyman*, 3 Bradf. 426; *Crosby v. Merriam*, 31 Minn. 342; *Frey v. Frey*, 17 N. J. Eq. 71; *Nunn v. Nunn*, 66 Ala. 35. After the lapse of such time, the executor or administrator is *prima facie* liable for interest, and the burden is on him, upon an accounting, to explain or justify the delay: *Lent v. Howard*, 80 N. Y. 169; and see *King v. Talbot*, 40 Id. 76; *Parker v. McGahn*, 11 Ala. 521; *Hollis v. Coughman*, 22 Id. 478; *Eubank v. Clark*, 78 Id. 73; *Dosten v. Arnold*, 60 Ga. 316. But, as a general rule, if he has not used the money of the estate to his personal advantage, and is not in fault for not investing it, he is not chargeable with interest on it: *Bartlett v. Fitz*, 59 N. H. 502; *Wilson v. Linberger*, 88 N. C. 416.

It is also well settled that an executor or administrator is accountable for all interest or profits actually received by him from the trust fund, whether used in his private business or otherwise employed by him: *Oldham v. Collins*, 4 J. J. Marsh. 49; *Estate of Scofield*, 99 Ill. 518; *Difenderfer v. Weinder*, 3 Gill & J. 311; *Tichenor v. Tichenor*, 10 Atl. Rep. 867 (N. J.); *Ringgold v. Stone*, 20 Ark. 526; for in no event will he be allowed to profit out of the trust funds: *Norris's Appeal*, 71 Pa. St. 125; *Cruce v. Cruce*, 81 Mo. 676; *Johnston's Appeal*, 11 Atl. Rep. 78 (Pa.). If, therefore, an executor or administrator has used the money of the estate himself, he will be charged with simple interest thereon, although he has not made a profit equal to simple interest; and if he has made more than simple interest, he will be charged with the whole profits, either by charging him with compound interest, or in such other manner as will best carry out the principle of giving the beneficiaries all the profits: *Cannon v. Apperson*, 14 Lea, 553; and see *Troup v. Rice*, 53 Miss. 278; *Brandon v. Hoggatt*, 32 Id. 351; *McKnight v. Walsh*, 23 N. J. Eq. 136; S. C., 24 Id. 498; *Whitney v. Peddicord*, 63 Ill. 249; *Hender-*

son v. Henderson, 58 Ala. 582; *Merrifield v. Longmore*, 66 Cal. 180; the beneficiaries in doubtful cases being allowed to elect: *Utica Ins. Co. v. Lynch*, 11 Paige, 520; *Hannah v. Hannah*, 68 N. Y. 610; *Estate of Holbert*, 39 Cal. 597.

Where an executor or administrator mingles the money of the estate with his own, and uses it so that he cannot pay over the same when called for by those entitled to it, he is justly chargeable with interest: *Brown v. Rickets*, 4 Johns. Ch. 303; *Brown's Estate*, 11 Phila. 127; *Jacob v. Emmett*, 11 Paige, 142; *Estate of Clark*, 53 Cal. 355; *Aldridge v. McClelland*, 36 N. J. Eq. 288; *Kerr v. Laird*, 27 Miss. 544; *Grigsby v. Wilkinson*, 9 Bush, 91. But the mere fact that he mingles the money of the estate with his own by depositing it in his own name, as he does his individual money, cannot be held a sufficient ground to charge him with interest. So long as he has the money of the estate at his command ready to answer the order of the court, this is all that the law requires: *Estate of Schofield*, 99 Ill. 513. But compare *Estate of Clark*, 53 Cal. 355. Nor will he be charged with interest, where it is not certain that he used the money of the estate for his own profit, there being only a mere suspicion that he did: *Grant v. Edwards*, 93 N. C. 488. But an executor who deposited money of the estate with a business firm of which he was a member, and permitted the firm to use such money, was held liable for interest thereon, although it did not appear that the profit from its use was as much as the interest: *Cannon v. Apperson*, 14 Lea, 553; and see *Re Mairs*, 4 Redf. 160.

The rate of interest to be exacted from executors and administrators must depend upon the special circumstances of each case, and cannot be determined by an unvarying rule: See *Ogilvie v. Ogilvie*, 1 Bradf. 356; *Vanderheyden v. Vanderheyden*, 2 Paige, 288; *Morgan v. Morgan*, 4 Demarest, 353; *Barney v. Saunders*, 16 How. 542; *Hook v. Payne*, 14 Wall. 252. The practice which prevails in equity in charging trustees with interest has generally been recognized as applicable, and such interest is allowed in equity as is just and reasonable: *Hollister v. Barkley*, 11 N. H. 511; *Cruce v. Cruce*, 81 Mo. 676. Where they employ in their own business the funds held by them in a fiduciary capacity, they will at least be held accountable for the legal rate of interest for the use of the money: *Cannon v. Apperson*, 14 Lea, 553, 581; *Frost v. Winston*, 32 Mo. 489; *Morgan v. Morgan*, 4 Demarest, 353; and see *Williams v. Powell*, 15 Beav. 461; *Jones v. Foxall*, 15 Id. 388; and it is held that the stringency of this rule will not be relaxed in consideration of the fact that the fund has at all times been protected against loss by reason of the misappropriation: *Morgan v. Morgan*, 4 Demarest, 353. So, in some of the decisions, a simple use of the funds by the executor or administrator in his trade or business has been denounced as gross delinquency and willful violation of duty, justifying the charge of compound interest: See *Scheiffelin v. Stewart*, 1 Johns. Ch. 620; *Dixon v. Storm*, 4 Redf. 18; *Berwick v. Halsey*, 4 Id. 18; *Lansing v. Lansing*, 31 How. Pr. 55; S. C., 45 Barb. 82; *Hannah v. Hannah*, 68 N. Y. 610; *Estate of Clark*, 53 Cal. 355; *Merrifield v. Longmore*, 66 Id. 180. But compound interest is only allowed in clear cases of gross delinquency, or of an intentional violation of duty: *Utica Ins. Co. v. Lynch*, 11 Paige, 520; *Freeman v. Freeman*, 4 Redf. 211; *Barney v. Saunders*, 16 How. 542; *Hook v. Payne*, 14 Wall. 252; *Ackerman v. Emott*, 4 Barb. 626; *Williams v. Petticrew*, 62 Mo. 460; *Scott v. Crews*, 72 Id. 261; *Pomeroy v. Benton*, 77 Id. 64; and for a mere neglect to invest funds of the estate, simple interest is generally imposed: *Thorn v. Garner*, 42 Hun, 507; and see *Matter of Thurston*, 57 Wis. 104. And it is held that all orders for periodical rests and for compounding interest should be adopted, not for punishing the de-

linquent trustee, but for the purpose of attaining the actual or presumed gains, and to make certain that nothing of profit or advantage remains to him, except, perhaps, his commissions or compensation: *Cruce v. Cruce*, 81 Mo. 676; and see *Ames v. Scudder*, 11 Mo. App. 168; S. C., 83 Mo. 189; *Hough v. Harvey*, 71 Ill. 72; *Ringgold v. Ringgold*, 1 Har. & G. 11; *Attorney-General v. Alford*, 4 De Gex, M. & G. 843; *Shepard v. Patterson*, 3 Demarest, 183; *King v. Talbot*, 40 N. Y. 76; *Adair v. Brimmer*, 74 Id. 539. In other words, the principle on which compound interest is usually allowed is, that the trustee has either actually or presumably made it, or ought to have made it: *Burdick v. Garrick*, L. R. 5 Ch. App. 233; *Harvard v. Durant*, 14 R. L. 25; and see *Perrine v. Petty*, 34 N. J. Eq. 193.

Some recent decisions, which may serve to illustrate the foregoing rules and principles, are as follows: An administrator cannot be charged with interest at a greater rate than the legal rate because he is indebted to the estate and has realized the greater rate on money of his own: *Grant v. Edwards*, 92 N. C. 442. Where a trustee invested the trust funds at ten per cent, but the investment was repudiated by the *cestui que trust*, and condemned by the court as injudicious and improper, the trustee was held to be properly chargeable with only six per cent interest: *Cogbill v. Boyd*, 79 Va. 1. An executor used in his own business for several years the property of the estate, on which he could readily have obtained ten per cent interest, and he was held chargeable with interest at that rate, but not compounded: *Cruce v. Cruce*, 81 Mo. 676. An administrator resided during the war of the Rebellion in the midst of active hostilities, where nearly all business was suspended, and it was held that he was not chargeable with interest on funds of the estate in his hands during that period: *Brent v. Clevinger*, 78 Va. 12. An executor or administrator is chargeable with interest on sums appropriated by him in payment of his commissions in advance of their allowance by the surrogate: *Estate of Meyer*, 67 How. Pr. 170; *Wheelwright v. Roades*, 23 Hun, 57; *Freeman v. Freeman*, 4 Redf. 211; so an executor must account for the interest on money of the estate appropriated to the payment of a legacy to himself which is not yet due: *McClure v. Brown*, 56 Iowa, 768; and payment by an administrator of a legacy, barred by lapse of time, is a misappropriation of funds for which he is chargeable with interest from the date of the misappropriation: *Moody v. Hemphill*, 71 Ala. 169. An administrator who fails to keep an account of the time of collection of notes belonging to the estate, and the amount of interest he received, is chargeable with interest for the whole time: *Jackson v. Shields*, 87 N. C. 437. So where a debtor to the decedent's estate becomes administrator thereof, and includes his debt in the inventory as an asset of the estate, this does not affect his individual relation as debtor to the estate, and upon the settlement of his administration account he is personally chargeable with interest until the debt was paid, or its amount was shown to be in his hands as administrator: *Rodenbach's Appeal*, 102 Pa. St. 572. So an executor who, under an agreement with a co-executor, occupies real estate belonging to the estate at an agreed rental per month, but who pays no part of the rent to his co-executor, or holds it in readiness to be disbursed for the benefit of the estate, is chargeable with interest upon each month's rent from the time it becomes due to the date of the decree settling the executors' accounts: *Tichenor v. Tichenor*, 10 Atl. Rep. 867 (N. J.).

In New York, executors are not required to sell non-perishable personal property, unless the will so provides, or a sale be necessary to pay debts and legacies, and they should not, upon their final accounting, be charged with interest on the value of such property so retained: *Greene v. Greene*, 23 Hun, 478.

MINERS' DITCH COMPANY v. ZELLERBACH.

[87 CALIFORNIA, 542.]

RIGHTS OF STRANGERS DEALING WITH CORPORATION MAY VARY according as they are considered with reference to the corporation itself, its stockholders, or its creditors.

THERE ARE THREE CLASSES OF CORPORATIONS; namely, public municipal corporations, the leading object of which is to promote the public interest; *quasi* public corporations, having in view some public enterprise in which the public interests are directly involved, as railroad, turnpike, and canal companies; and corporations strictly private, the object of which is to promote private interests.

TERM "ULTRA VIRES," USED IN REFERENCE TO ACTS OF CORPORATION, IS EMPLOYED IN DIFFERENT SENSES. An act is said to be *ultra vires* when it is not in the power of the corporation to perform it under any circumstances, in which case the act is void *in toto*, and the corporation may avail itself of the plea. An act is also said to be *ultra vires* with reference to the rights of certain parties, when the corporation cannot perform it without their consent; and it may also be *ultra vires* with reference to some specific purpose, when the corporation cannot perform it for that purpose. When the act is *ultra vires* in the last two senses, the right of the corporation to avail itself of the plea will depend upon the circumstances of the case.

CORPORATION ORGANIZED FOR PURPOSE OF OWNING DITCHES FOR CONVEYANCE AND SALE OF WATER HAS POWER to sell and convey all its corporate property, provided the sale is made for corporate or lawful purposes, and strangers taking a conveyance are entitled to assume, as against the corporation, that the sale was for a lawful purpose. Such sale and conveyance may be made to any person, natural or artificial, capable of taking, and the stockholders of one or more corporations may form themselves into a new corporation, and the property of one or both of the old corporations may be conveyed to the new corporation.

DEED IS ADMISSIBLE IN EVIDENCE AS DEED OF CORPORATION, where it purports to be such, is signed by the trustees as trustees, and has the corporate seal attached. It is itself *prima facie* evidence of the regular and duly authorized execution of the same, and it devolves upon the party contesting its validity to overthrow this presumption.

CORPORATION CANNOT AVAIL ITSELF OF INVALIDITY OF SALE AND CONVEYANCE OF ALL ITS PROPERTY for an illegal purpose, in an action to recover the property from a stranger who purchased it after the contract of sale and conveyance was fully executed on both sides, and with knowledge of that fact.

CONCEDING UNLAWFULNESS OF SALE BY CORPORATION OF ALL ITS PROPERTY TO ANOTHER CORPORATION, and receiving in payment therefor the stock of the grantee, to be distributed among its own stockholders, yet, if such contract has been fully executed, the corporation itself cannot recover back the property sold, or set aside the contract on account of its illegality.

ACTION to recover the possession of certain water ditches, etc. A statement of the material facts appear in the opinion. Judgment was rendered in favor of the defendant, and the plaintiff appealed.

J. B. Harmon, for the appellant.

Joseph P. Hoge, A. C. Niles, and D. Belden, for the respondents.

By Court, SAWYER, C. J. The Miners' Ditch Company, plaintiff in this action, has been since 1859 a corporation under the laws of California, "its object being the building and maintaining of water-ditches, and the sale of water in said Nevada County." In May, 1859, said corporation owned the property in controversy, consisting of the Miners' Ditch, the Poorman's Ditch, and the Grizzly Ditches. At that time there was another similar corporation, owning similar property, in the same vicinity, called the Eureka Lake Company, both supplying the same market. The property and business of the two corporations being similar, and a number of persons being members and stockholders in both, it was agreed, in May, 1859, by both, that the property of the two corporations should be thrown together and managed in common, and should be owned in the proportions of two shares to the Miners' Ditch Company, and three to the Eureka Lake Company. Certain improvements were to be made by each corporation on its own original property, and each was to pay its own debts. The two corporations commenced acting together on the 29th of June, 1859. The property of both was at that time put into the hands of common agents, who had the full management and control of the property and business down to the fall of 1860, the business being done under the name of the Eureka Lake and Miners' Ditch companies. During this time, large amounts of money were expended in improving the common property, and other property of a similar character was acquired. This arrangement was only intended to be temporary. It was then proposed to form a new corporation, to be organized by the stockholders of the two old ones, to which the property of both old corporations should be conveyed.

At a meeting of the stockholders of the Eureka Lake Company, held on the 3d of September, 1860, it was resolved that a new corporation, to be called the Eureka Lake Water Company, should be formed, and that the Eureka Lake Company should convey to it all its property, on condition that the Miners' Ditch Company, the plaintiff in this case, should do the same, and that the stock of the new corporation should be credited to the stockholders of the two old corporations, in the proportions agreed upon. On the second Saturday of Septem-

ber, 1860, there was a regular meeting of the stockholders of the Miners' Ditch Company, which was adjourned for two weeks. At or about the time appointed for the adjourned meeting, there was a meeting of either the stockholders or the trustees, or both. The testimony does not show clearly the exact character of this meeting, that is,—whether it was of the stockholders or trustees,—but it is clear that there was a meeting of either the one or the other, or both. At this meeting there was a resolution passed, authorizing the trustees to convey the property of the Miners' Ditch Company to the corporation to be formed, viz., the Eureka Lake Water Company. On or about the 29th of October, 1860, a deed bearing that date was executed by the trustees of the Miners' Ditch Company to the Eureka Lake Water Company, conveying all the property of the former to the latter, including the property described in the complaint, except the Malakoff Ravine and Eureka Lake saw-mill, which were subsequently acquired. This deed purports upon its face to be a deed of the Miners' Ditch Company as a corporation, has the corporate seal annexed, and is signed as trustees and duly acknowledged by James B. Henry, George C. Powers, James Cregan, George Fellows, and Robert McKerrow, who were at the time the trustees of the corporation. The deed was duly recorded in the recorder's office of said county, on the 11th of November, 1861. The Eureka Lake Company, having been advised that their incorporation had never been legally perfected, on the 25th of October, 1860, individually executed a deed, which was duly recorded, purporting to convey the property of said company to the Eureka Lake Water Company. On the 14th of November, 1860, the Eureka Lake Water Company, having been duly organized as a corporation under the laws of this state, took possession of the property of the Miners' Ditch Company and Eureka Lake Company, conveyed and attempted to be conveyed by said two deeds, and from that time to January, 1863, had full possession and control of the same, claiming it as its own under said deeds, and no one interfering with or disputing its title or possession. Immediately after the organization of the Eureka Lake Water Company, stock books were opened, and stock issued to the members of the two old corporations in the proportions agreed upon. After the Eureka Lake Water Company took possession, it expended large sums of money in improving the property, and in paying off liens thereon. In 1862, the Eureka Lake Water Company executed to defend-

ants, Zellerbach and Powers, a mortgage on all its property, including that described in the complaint, to secure the payment of the sum of two hundred thousand dollars. This was for money advanced, and to be advanced; and the whole sum of two hundred thousand dollars was advanced before January, 1863.

The mortgage provides that the defendants might receive and apply the profits and income of the property to the satisfaction of the mortgage debt; and on the 3d of January, 1863, the Eureka Lake Water Company gave full possession and control of all the property to Zellerbach and Powers for that purpose. Zellerbach and Powers held full and uninterrupted possession under the arrangement until the 5th of February, 1865, at which time they acquired all the right of the Eureka Lake Water Company to the property, by virtue of a sheriff's deed made on an execution sale under judgment recovered against said company by one Martin. Powers conveyed his interest, being one half, to defendant, Zellerbach, in September, 1865. Down to September, 1865, Zellerbach and Powers, and from that time Zellerbach alone, have been in continued possession, holding under and as successors to the Eureka Lake Water Company. Said mortgage has not been paid, nor have the rents and profits been sufficient to satisfy it. The Eureka Lake Water Company made large improvements on the property held by the Miners' Ditch Company described in the complaint, amounting in value to at least fifty thousand dollars. It also paid mortgages on said property, which had been created by the Miners' Ditch Company, amounting to at least ninety thousand dollars. It does not appear affirmatively that the trustees of the Miners' Ditch Company, in corporate body assembled, formally authorized the execution of the deed to the Eureka Lake Water Company, or that it was executed at a formal meeting of the board of trustees. It was executed, however, by the three trustees, Henry, Powers, and Cregan, at one and the same time, and while they were together, and in the presence of each other. The other two trustees, George Fellows and Robert McKerrow, signed it separately, and at another time. The by-laws of the Miners' Ditch Company do not contain any provisions about the meetings of the trustees, and it does not appear how they were called or held, or in what manner they usually transacted their business. The certificate of incorporation of the Miners' Ditch Company contains the following statement of the ob-

jects and purposes of the company: "The objects for which the said company is formed is, to divert the waters running in the bed of the Middle Yuba, at or near a point one thousand six hundred yards above the Forks, and by means of canal or canals, to be constructed by said company, to carry said water along the ridge of the south side of said Middle Yuba, and supply the miners of Snow Point, Orleans, Moore's and Woolsey's flats, and other places along said ridge, with water, and employ said water for mining, manufacturing, and mechanical purposes."

From the date of the deed in October, 1860, the trustees of the Miners' Ditch Company did not meet again, as a board, until October, 1865, and during that time did not pretend to do any business, or to set up any claim to or control of the property described in the complaint; and it had knowledge that the Eureka Lake Water Company, and afterwards Zellerbach and Powers, had possession of the property, and claimed ownership of the same under the said deed from the Miners' Ditch Company. All the premises described in the complaint, as well as the other property claimed by defendants, and also various other ditches owned by other companies, are situated on the ridge which divides the waters of the middle and south forks of the Yuba River; nearly all the stockholders of the Miners' Ditch Company lived on said ridge at the time of the transfer of the property to the Eureka Lake Water Company; the sale and transfer were public and notorious events; a majority of the stockholders had actual notice of the transaction, and all are chargeable with such notice. No objection was made to the asserted title of the Eureka Lake Water Company, or its possession, by the Miners' Ditch Company, or by any one of its trustees or agents, until the fall of 1865, a short time before this suit was commenced. All the property described in the complaint is situate on the public domain of the United States, and is held by possessory title alone.

The foregoing are the facts, substantially, as found by the court below. It also finds, as a fact, that the property described in the deed of October, 1860, was not essential to the business and existence of the Miners' Ditch Company, but adds: "I look upon the question, however, as scarcely one of pure fact, and prefer finding the real facts upon the point. They are these: After the company had sold all its property, of course it could not have done any more business in the matter of min-

ing or selling water without acquiring another water right and ditch, by purchase or by location and construction; it might have purchased other ditches and water rights in the same vicinity; it might also have located another water right in the same stream to which its original ditch was constructed, and might have built a new ditch. It would have thus obtained a supply of water in the wet season, but not in the dry season; and the project of building a new ditch would probably not have been profitable."

The general statute, under which these several corporations were organized, provides that the certificate filed shall, among other things, state "the objects for which the company shall be formed": Stats. 1859, p. 93, sec. 2; that it shall have power "to purchase, hold, sell, and convey such real and personal estate as the purposes of the corporation shall require": Stats. 1853, p. 87, sec. 4; and that "it shall not be lawful for the trustees to make any dividend, except from the surplus profits arising from the business of the corporation, nor to divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company, nor to reduce the capital stock, unless in the manner prescribed in this act; and in case of any violation of the provisions of this section, the trustees, under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large on the minutes of the board of trustees at the time, or were not present when the same did happen, shall, in their individual and private capacities, be jointly and severally liable to the corporation, and the creditors thereof, in the event of its dissolution, to the full amount so divided, withdrawn, paid out, or reduced; provided that this section shall not be construed to prevent a division and distribution of the capital stock of the company, which shall remain after the payment of all its debts, upon the dissolution of the corporation, or the expiration of its charter": Stats. 1853, sec. 13. The objects for which the Miners' Ditch Company was formed, as set forth in the certificate, have already been stated among the facts found by the court.

The first point made by the appellant is: "The consolidation of the Miners' Ditch Company and the Eureka Lake Company, by a mutual transfer and sale of their respective ditches and water rights to the Eureka Lake Water Company, in consideration of shares therein issued to the stockholders of the two former companies, in proportions of two fifths and three fifths,

was *ultra vires*, and therefore void." In support of the point, it is argued that the transfer of all the said property of the Miners' Ditch Company was not in pursuance of the "purposes of the corporation," but was, on the contrary, destructive of those purposes, and therefore not in pursuance of the powers conferred. If wrong in this view, that then the transfer of the property of the two old corporations to the Eureka Lake Water Company, in pursuance of the understanding had between the stockholders of the two old corporations, and in payment therefor receiving certificates of stock and distributing the same among the several stockholders of the old corporations in the proportions agreed upon, was in substance withdrawing and dividing among the stockholders the capital stock of the old corporations, contrary to the provisions of said thirteenth section.

In thus ingeniously grouping together in his point and argument several particulars, and constantly exhibiting them to the mind at one view, as a whole, counsel doubtless presents his case in its most plausible and formidable aspect. But in this case, as in most others, in order to attain correct conclusions, it is necessary to consider separately every element that may affect the general result. In considering the cases in which the law applicable to corporations is discussed, it must also always be borne in mind that there are several classes of rights to which they apply, and that upon the same general state of facts the legal consequences might be different with reference to the different classes of rights. Thus there are corporate rights,—that is to say, rights which pertain to the corporation as such,—the artificial legal entity created by the act of incorporation, considered as a single, distinct person; individual rights of the stockholders as such, and rights of the creditors of the corporation. The rights of strangers dealing with the corporation may vary according as they are considered with reference to the corporation itself, the stockholders, or the creditors of the corporation. So, also, there are several classes of corporations, such as public municipal corporations, the leading object of which is to promote the public interest; corporations technically private, but yet of a *quasi* public character, having in view some great public enterprise in which the public interests are directly involved to such an extent as to justify conferring upon them important governmental powers, such as an exercise of the right of eminent domain. Of this class are railroad, turnpike, and canal companies, and

corporations strictly private, the direct object of which is to promote private interests, and in which the public has no concern, except the indirect benefits resulting from the promotion of trade and the development of the general resources of the country. They derive nothing from the government, except the right to be a corporation, and to exercise the powers granted. In all other respects, to the extent of their powers, they stand upon the footing of natural persons, having such property as they may legally acquire, and holding and using it ultimately for the exclusive benefit of the stockholders. In this last class, the stockholders, and those dealing with the corporation, are the only parties directly and immediately interested in their acts, so long as the corporation confines itself within the general scope of its powers. The rights of the corporation, the corporators, and of strangers dealing with the corporation, may, in some respects, vary, according to the circumstances surrounding a given transaction.

The term *ultra vires*, whether with strict propriety or not, is also used in different senses. An act is said to be *ultra vires* when it is not within the scope of the powers of the corporation to perform it under any circumstances, or for any purpose. An act is also, sometimes, said to be *ultra vires* with reference to the rights of certain parties, when the corporation is not authorized to perform it without their consent; or with reference to some specific purpose, when it is not authorized to perform it for that purpose, although fully within the scope of the general powers of the corporation, with the consent of the parties interested, or for some other purpose. And the rights of strangers dealing with corporations may vary, according as the act is *ultra vires* in one or the other of these senses. All these distinctions must be constantly borne in mind in considering a question arising out of dealings with a corporation. When an act is *ultra vires* in the first sense mentioned, it is generally, if not always, void *in toto*, and the corporation may avail itself of the plea. But when it is *ultra vires* in the second sense, the right of the corporation to avail itself of the plea will depend upon the circumstances of the case.

Cognate questions were very thoroughly and ably discussed by Mr. Justice Comstock and Mr. Justice Selden, in *Bissell v. Michigan Southern and Northern Indiana R. R. Cos.*, 22 N. Y. 262, the latter dissenting from many of the views of the former, but both agreeing in the views just expressed with reference to acts *ultra vires* in the last sense mentioned. Mr

Justice Comstock says: "Circumstances may, and often do, exist, which estop the offender from taking advantage of his own wrong. The contract may be entered into on the other side without any participation in the guilt, and without any knowledge even of the vice which contaminates it. An innocent person may part with value, or otherwise change his situation, upon the faith of the contract. A railroad corporation, for example, may purchase iron rails and give its obligation to pay for them, with a design to sell them again on speculation, instead of using them for continuing its track. Such a transaction is clearly unauthorized, and is, therefore, said to be illegal. But if the corporation is deemed to make the contract, — in other words, if, as I have above shown, it is a legal possibility for corporations to make contracts outside of their just powers, — how can its illegality be set up against the other party, who knows nothing of the unlawful purpose? So an incorporated bank may purchase land, having power to do so for a banking-house, but actually intending to speculate in the transaction. This is also *ultra vires*; but can the want of authority be interposed in repudiation of a just obligation to pay for the same land, the vendor not being *in pari delicto*? Such a doctrine is not only shocking to the reason and conscience of mankind, but it goes far beyond the law in regard to the illegal contracts of private individuals." Again: "That term [*ultra vires*] is of a very modern invention, and I do not think it well chosen to express the only principle which it can be allowed to represent in cases of this nature. It is not to be understood as an absolute and peremptory defense in all cases of excess of power without regard to other circumstances and considerations": Id. 275. Mr. Justice Selden (whose views the appellant's counsel seems to approve) says, in the same case: "There are, no doubt, cases in which a corporation would be estopped from setting up this defense, although its contract might have been really unauthorized. It would not be available in a suit brought by a *bona fide* indorsee of a negotiable promissory note, provided the corporation was authorized to give notes for any purpose; and the reason is, that the corporation, by giving the note, has virtually represented that it was given for some legitimate purpose, and the indorsee could not be presumed to know the contrary. The note, however, if given by a corporation absolutely prohibited by its charter from giving notes at all, would be voidable, not only in the hands of the original payee, but

in those of any subsequent holder, because all persons dealing with a corporation are bound to take notice of the extent of its chartered powers."

The same principle is applicable to contracts not negotiable: *Bissell v. Michigan Southern and Northern Indiana R. R. Cos.*, 22 N. Y. 289. Mr. Justice Selden also cited the following passage from the opinion of Lord St. Leonards: "The opinions of some of the judges in the Norwich case favor the disposition which I feel to restrain the doctrine of *ultra vires* to clear cases of excess of power with the knowledge of the other party, express or implied from the nature of the corporation and of the contract entered into"; and adds: "To this I agree": *Id.* 301. The consequence of the distinction we have taken in respect to contracts, *ultra vires* in the different senses indicated, is fully recognized by the English authorities as well as our own, and as it is important, and the reasoning can be no better stated in any language we may select, we shall make some extracts from the opinions in the English cases. In *Mayor of Norwich v. Norfolk R'y Co.*, 30 Eng. L. & Eq. 128, Mr. Justice Earle says: "The doctrine [relating to defense of *ultra vires*] was introduced at law by the East Anglian Railway Company case [*East Anglian R'y Co. v. Eastern Cos. R'y Co.*, 16 Jur. 249], and the contract there in question being a contract by one railway company to pay the costs of another railway, incurred in applying to Parliament, was judicially perceived from the terms of the contract itself, to be necessarily unconnected with the purpose of the defendant's incorporation, and therefore prohibited. This is the point decided in the case. Looking to the report, with the remarks in the argument, I understand the court to have meant that any application of the funds, and any contract which, in the knowledge of the party who should sue upon the contract, was intended for a purpose unconnected with the purpose of incorporation, was prohibited; and that, where the contract itself appeared to be necessarily unconnected with the purpose of incorporation, both the parties must have known it to be so, and the court judicially perceive it to be void; and that if the contract was not necessarily so unconnected, the ground of illegality must be averred and found in the usual way before it could be a ground of judgment; and that no application of the funds and no contract was prohibited by implication, which the parties intended to be connected with the purpose of incorporation, however distant the connection might be.

The question put in the course of the argument, Would a contract by a railway company for a theater or chapel be void? exemplifies the doctrine.

"It would or would not, according as the purpose of the contracting parties was or was not connected with the railway. It might be a speculation separate from the railway, and prohibited. Or, if works were wanted in a waste place, and the company found it for their interest to build a town and supply it with all requisites for inhabitancy, and in order to secure a permanent supply of workmen of skill and responsibility, added a chapel and a theater, with religious and secular instruction, it might be for the purpose of the railway, and valid, and though distantly connected, the outlay might be found eventually to increase the profit from the traffic." Again: "The case of *McGregor v. Dover and Deal R'y Co.*, 17 Jur. 21, S. C., 16 Eng. L. & Eq. 180, shows that the question at law is, whether the contract was prohibited, not whether it was made in excess of the authority given to the directors. There the contract of *McGregor*, that the railway company should pay costs, was held void, because such a payment by the company was prohibited by law. If a contract by the company for such a payment would have been merely an excess of authority, the contract of *McGregor* would have bound himself, and would not have been absolutely void. The expression that the contracts, which are held null within the doctrine in question, are void because they are *ultra vires*, seems to imply that the courts of law, in an action against a corporation upon a contract duly made and valid in form, compare the contents of the contract with the powers supposed to be given to the directors by the shareholders, either in the capacity of agents for them or by the statute, and hold it void if there is an excess beyond those supposed powers": *Mayor of Norwich v. Norfolk R'y Co.*, 30 Eng. L. & Eq. 130, 131.

So the same justice recognizes the difference between cases where stockholders are suing in equity to restrain a misappropriation of the corporate funds, and a suit on a contract against the corporation by a stranger. "In these suits in equity the members of the corporation, in their individual capacity, are considered to have rights *inter se* analogous to those of partners *inter se*, and the act incorporating the company is considered to be analogous to a partnership deed: See the judgment of Sir G. J. Turner, L. J., in *Simpson v. Denison*, 10 Hare, 51; S. C., 13 Eng. L. & Eq. 359; and the question is, whether the

misapplication is so unreasonable in kind and degree as to require the interference of the court for the protection of the complaining party. From these suits passages have been cited in which the judges have expressed opinions on the expediency of checking with much strictness the directors of incorporated companies having extensive powers and large capital,—opinions which might be highly reasonable with reference to share-holders complaining of over-speculation on the part of the directors at their cost; but they seem unreasonable and iniquitous if applied to the administration of the law in actions to which such corporations are parties. These suits in equity between different members of the company bear no analogy to actions at law by third persons against the corporation, either in respect of the parties to the suit or the subject in litigation. As to the parties in actions against corporations, the members thereof, in their individual capacity, are strangers to the suit; and the rights of persons who contract with corporations are unaffected by the rights of members *inter se*": Id. 130. Lord Campbell, also, in the same case, says: "The mere circumstance of a covenant by directors in the name of the company being *ultra vires* as between them and the share-holders, does not necessarily disentitle the covenantee to sue upon it. For example: If the directors of a railway company were to enter into a contract, under the seal of the company, for the purchase of a large quantity of iron rails, and to pay for them at a fixed price, as the vendor had reasonable ground for supposing that the rails were wanted for the purposes of the railroad, it would be no defense to an action for the price, or for not accepting them, that the rails were illegally purchased on speculation, to be resold by the directors for their own profit. But suppose that the directors of a railway company should purchase a thousand gross of green spectacles as a speculation, and should put the seal of the company to a deed covenanting to pay for these goods, here would be a clear excess of authority on the part of the directors; this excess of authority would necessarily be known by the covenantee, and he being *in pari delicto*, I conceive that the maxim would apply, *Potior est conditio possidentis*. This would be an illegal contract to misapply the funds of the company, and the illegality might be set up as a defense": Id. 143, 144.

There was no difference between the judges as to these principles, although there was a disagreement as to whether, by comparing the contract with the statute, it appeared upon

its face to be *ultra vires*. So in *Eastern Counties R'y Co. v. Hawkes*, 35 Eng. L. & Eq. 9, which was a suit to compel the railway company to specifically perform a contract for the purchase of lands from Hawkes, the complainant in the court below. The corporation, among other defenses, insisted that the contract was *ultra vires*. A specific performance was decreed by the vice-chancellor, which decree was affirmed by the lord chancellor, on appeal, and again by the house of lords, on appeal from his decree. In the house of lords, Lord Chancellor Cranworth said: "A small portion only of it, about an acre and a half, is within the line of deviation, and it was argued that a contract to purchase the whole (nearly six acres) was a contract *ultra vires*, inasmuch as the company could only purchase what was really necessary or proper for the construction of the line. But the answer to this argument appeared to me satisfactory. The contract was necessarily and on the face of it *ultra vires*. If the land in question was really wanted by the appellants for what are called extraordinary purposes, they were authorized to purchase it. Besides, the line of deviation actually cuts the respondent's house in two, and in such circumstances the appellants had no right to take a part without taking the whole, if the plaintiff required them to do so; and it is a reasonable inference that the contract to purchase the whole was made, because, wanting what was within the limits of deviation, the directors knew that they could not stop short with what was within those limits. Be that, however, as it may, there was nothing to show the respondent that his land was not wanted for the legitimate objects of the company, and in such a case it cannot be permitted to the directors to allege that the contract was invalid, as beyond their powers; for, as argued at the bar, it would be no answer to an action for iron rails bargained and sold that the contract had been entered into, not in order to obtain rails for the use of the line, but in order to keep them in hand for the purpose of a future use, on a speculation that iron was likely to rise in value. I consider, therefore, that this second objection is as untenable as the first": *Id.* 19. And Lord Campbell said: "There can be no doubt that, as between the directors and the share-holders, it would have been *ultra vires* for the directors to put the seal of the company to such a contract. They could not lawfully apply the funds of the company to the making of the line, either under the act of the 10 & 11 Vict., c. 235, or any of their prior acts; and the re-

spondent having full notice that they were exceeding their powers, and were guilty of a breach of trust, he could not have enforced the contract either at law or in equity. But upon the face of the contract itself there is no reference whatever to the 'direct diverging line.' The recitals and the operative part of the contract refer only to the main line between Wisbach and Spalding, and to the 'curvilinear line' of junction delineated upon the parliamentary plan; nor is there any evidence to prove that the respondent was a party to the scheme alleged to have been formed by agents of the company to deceive Parliament by abandoning the curvilinear and substituting an unauthorized direct line of junction with the Ambergate railway": *Eastern Counties R'y Co. v. Hawkes*, 35 Eng. L. & Eq. 22.

And Lord St. Leonards also said: "Under this head [that the contract was *ultra vires*], the general question of the power of such companies to bind themselves was argued. Now this is a question between the appellants, bound by their contract under seal, and the party with whom they contracted. It is not a question between them and their share-holders, but, as was observed in *Edwards v. Grand Junction R'y Co.*, 1 Mylne & C. 674, the court cannot recognize any party interested in the corporation, but must look to the rights and liabilities of the corporation itself. The covenant of the company is binding on the face of it, and the appellants must show, if they can, why it should not be so. Here they were properly bound. The property was within the bill as brought in, and within the act as passed, and if the property in question had not been purchased before the act, it might have been bought after the act passed. It is no objection that the whole was not within compulsory powers. The land clauses act provides that no party shall be required to sell a part only of any house, if he is able and willing to sell and convey the whole. And to that extent, of course, the appellants might properly agree to purchase the whole of the house, although they required only a part of it. And at all events other parts of the property, according to the plans, would have been required for the railway, and the whole might have been required. I do not think that the contract can be avoided by the appellants showing that they do not require the whole. Where directors are acting in the obvious line of duty, as in this case, buying off an opposition, and acquiring property necessary or useful for the corporation, and the party contracting with such directors

is not aware of any intended misapplication on their part, I am of opinion that the contract is binding, although it can afterwards be shown that the property really was not required for the railway. The safety of men in their daily contracts requires that this doctrine of *ultra vires* should be confined within narrow bounds": *Eastern Counties R'y Co. v. Hawkes*, 35 Eng. L. & Eq. 31. He further said: "My noble and learned friend showed that the mere circumstance of a covenant by directors in the name of the company, being *ultra vires* as between them and the share-holders, does not necessarily disentitle the covenantee to sue upon it"; and expressed a disposition "to restrain the doctrine of *ultra vires* to clear cases of excess of power, with the knowledge of the other party, express or implied, from the nature of the corporation and of the contract entered into": *Id.* 32.

From the cases cited, it very clearly appears that the question, as between stockholders and the corporation, is a very different one from that which arises between the corporation itself and strangers dealing with it; and the principle established where the contest arises between strangers and the corporation is, whether the act in question is one which the corporation is not authorized to perform under any circumstances, or one that may be performed by the corporation for some purposes, but may not for others. In the former case, the defense of *ultra vires* is available to the corporation as against all persons, because they are bound to know from the law of its existence that it has no power to perform the act. But in the latter case, the defense may or may not be available, depending upon the question whether the party dealing with the corporation is aware of the intention to perform the act for an unauthorized purpose, or under circumstances not justifying its performance. And the test, as between strangers having no knowledge of an unlawful purpose and the corporation, is to compare the terms of the contract with the provisions of the law from which the corporation derives its powers; and if the court can see that the act to be performed is necessarily beyond the powers of the corporation for any purpose, the contract cannot be enforced; otherwise it can. Or, in the language of Mr. Justice Selden, in the case before cited: "Where the want of power is apparent, upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defense of *ultra vires* is available against him. But such a de-

fense would not be permitted to prevail against a party who cannot be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of power depends, not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts resting peculiarly within the knowledge of the corporate officers, then the corporation would, I apprehend, be estopped from denying that which, by assuming to make the contract, it had virtually affirmed": *Bissell v. Michigan Southern and Northern Indiana R. R. Cos.*, 22 N. Y. 290.

Strangers are presumed to know the law of the land; and they are bound, when dealing with the corporations, to know the powers conferred by their charter. These are open to their inspection, and it is easy to determine whether the act is within the scope of the general powers conferred for that purpose. But they have no access to the private papers of the corporation, or to the motives which govern directors and stockholders, and no means of knowing the purposes for which an act that may be lawful for some purposes is done. The very fact that the appointed officers of the corporation assume to do an act in the apparent performance of their duties, which they are authorized to perform for the lawful purposes of the corporation, is a representation to those dealing with them that the act performed is for a proper purpose. And such is the presumption of the law; and upon this presumption, strangers, having no notice in fact of the unlawful purpose, are entitled to rely. To this effect is the principle of the following, among other cases, as well as those already cited: *Commissioners of Knox County v. Aspinwall*, 21 How. 545, is a strong case applying this doctrine to public corporations; *Gelpecke v. City of Dubuque*, 1 Wall. 203, and cases cited; *Bank of United States v. Dandridge*, 13 Wheat. 69.

Upon any other principle, there would be no safety in dealing with corporations, and the business operations of these institutions would be greatly crippled, while the interests of the stockholders and the public, and their general usefulness, would be seriously impaired. The officers are appointed by the corporation, and if any loss results to strangers dealing with the corporation from their misrepresentation in matters within the general scope of their duties, it should fall upon the corporation, which is responsible for their appointment, rather than upon parties who have no other means of

ascertaining the facts, and must rely upon their assurances, or not deal with the corporation at all.

The next step in the argument is to ascertain whether the Miners' Ditch Company had power to sell and convey its corporate property for any purpose; and upon this point we entertain no doubt. We have already seen by the fourth section of the act under which it was incorporated that the corporation was empowered "to purchase, hold, sell, and convey such real and personal estate as the purposes of the corporation shall require." The power to sell and convey is as broad as its power to purchase and hold, and is granted in the same terms. There is no complaint that the property was not properly acquired, and that the corporation legally owned it. The *jus disponendi* necessarily attached as an incident to the ownership. The very idea of private property, in which the public has no rights, involves the idea of a right to sell and convey when the exigencies of the corporation require it. If a corporation could convey a part, it could convey the whole. The enterprise of the Miners' Ditch Company may have proved unprofitable, and rendered it necessary to dispose of its assets, and wind up the concern, as the only means of avoiding insolvency. It might be necessary to sell and convey a part or the whole of its property in order to raise means to pay its debts and avoid a sacrifice by forced sale. In either event, the sale and conveyance of the property, with these objects in view, would be a lawful purpose of the corporation. Although the object for which it was formed was to construct a ditch, and convey water for sale to miners, and for mechanical purposes, there was no obligation resting on the corporation to pursue this object after it became evident that the enterprise would be unprofitable, and result in insolvency or loss. When such a result appears to be unavoidable, obviously the only mode by which the interests of the parties, and of the public, could be subserved, would be to dispose of its assets in the most advantageous way, and pay off its debts, with a view to winding up the affairs of the corporation with the least possible loss.

When a corporation of the kind in question is formed under our laws, no obligation to the public is assumed to carry on the business for which it was formed throughout the period specified in its certificate, whether the enterprise proves profitable or not. A corporation may forfeit its franchise by non-use, but a conveyance of property of the kind in question is

not a transfer of its franchise. The district judge in his opinion well says: "But the ditches and water rights were no part of the franchises; they were not given by the legislature. The whole property was situate on the public domain, and could be acquired only by appropriation or purchase. The Miners' Ditch Company did not acquire any right to or property in the ditches or water right by virtue of its incorporation. After its charter had been perfected, and the legislative grant of its franchise had fully vested, it still had not a foot of ditch or an inch of water. Its property had then to be acquired in the same way that a natural person, without any franchises, could have acquired it. The case is entirely different from that of a railroad company, where a right of way, and other special rights in the nature of property, are granted by the charter. The only special privilege which the Miners' Ditch Company received through its charter is simply the right to be a corporation, and thereby to do business in a manner different, in some respects, from that in which an ordinary association of natural persons may do business. A franchise was formerly said to be 'a branch of the royal prerogative, existing in the hands of a subject'; and it may still be defined to be a special grant by the sovereign power of a peculiar privilege whereby the recipient may do or enjoy something which, in the exercise of the general rights of a subject or citizen, he could not do or enjoy. But any citizen in the land might, by virtue of his general personal rights, have acquired everything mentioned in the deed. The conveyance, then, was not of any franchise of the corporation. It is claimed, however, that as the deed conveyed all the property of the corporation, it was, in effect, a transfer of corporate powers, because it left nothing upon which the corporate powers could be exercised; in other words, that it destroyed the existence of the corporation. But the property sold was not essential to the existence of the corporation. The corporation was in full existence the moment its charter was perfected, although at that time it had not, and could not have had, a dollar's worth of property; and the books are full of cases where it is held that a corporation still exists after all its property is gone. The Miners' Ditch Company certainly did not die upon the transfer of all its property, as the bringing of this suit witnesseth; and I presume that a defense to a suit brought by a corporation on the ground that it had no property, and was therefore dead, would find no countenance in a court."

This corporation was created for the immediate benefit of the stockholders, with no direct specific public purpose in view, as in the case of a railroad, or turnpike, or canal companies. The only interest the public has in the continuance of the business is the remote general interest which it has in the proper development of the resources of the country. The restrictions placed upon it are for the purpose of giving the public notice of its powers, of confining its business to the line indicated in its certificate, and for protecting the share-holders and parties dealing with it against the usurpation of its officers. The corporation is a distinct individual, holding the legal title to the property in trust for the benefit of the share-holders, who are the beneficiaries having the equitable interest. If it is found from experience that the interest of the corporators and creditors require that the business should not be carried on upon so large a scale, or that it should cease entirely, and the disposal and conveyance of a part or the whole of the property is necessary to a reduction or cessation of the business, and the stockholders consent, or do not object, we know of nothing in the statute, or in sound public policy, to prevent the sale or conveyance for such purpose. The state can have no interest in compelling its citizens or corporations to carry on business of any kind at a loss. No sound public policy can drive corporations or private individuals, unwillingly, to insolvency. The interests of business men and of the public must necessarily coincide; for the prosperity of the state is but the aggregate of the prosperity of its citizens. These views are supported by the authorities, and we know of nothing to the contrary.

In *Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 393 [66 Am. Dec. 490], where a stockholder filed a bill to restrain the sale of all the property of the company to a new corporation for stocks, to be distributed to the stockholders of the old, it was held that the directors of a manufacturing corporation, as the best means of continuing the business, and pursuant to the votes of a majority of the stockholders, though against the protest of a minority, may sell the whole property of the corporation to a new corporation, taking payment in shares of the new corporation, to be distributed among those of the old stockholders who are willing to take them. The court say: "We entertain no doubt of the right of a corporation established solely for trading and manufacturing purposes, by a vote of the majority of their stockholders, to wind up their affairs and

close their business, if, in the exercise of a sound discretion, they deem it expedient so to do." After suggesting that there may be some limitation applicable to *quasi* public corporations, such as railway, canal, and turnpike companies, "to which the right of eminent domain and other large privileges are granted in order to enable them to accommodate the public," which do not apply to purely private, commercial, and manufacturing corporations, the court say, with reference to the latter: "Neither the public nor the legislature have any direct interest in their business or its management. These are committed solely to the stockholders, who have a pecuniary stake in the proper conduct of their affairs. By accepting a charter, they do not undertake to carry on the business, for which they are incorporated, indefinitely and without any regard to the condition of their corporate property. Public policy does not require them to go on at a loss. On the contrary, it would seem very clearly to be for the public welfare, as well as for the interest of the stockholders, that they should cease to transact business as soon as, in the exercise of a sound judgment, it is found that it cannot be prudently continued. If this be not so, we do not see that any limit could be put to the business of a trading corporation short of the entire loss or destruction of the corporate property. The stockholders could be compelled to carry it on until it came to actual insolvency. Such a doctrine is without any support in reason or authority. . . . Upon the facts found in the case before us, we see no reason to doubt that the vote of the majority of the stockholders for the sale of the corporate property, and the closing of the business of the corporation, was justified by the condition of their affairs. Without available capital, and without the means of procuring it, the further prosecution of their business would be unprofitable, if not impracticable. Under these circumstances, it was in furtherance of the purposes of the corporation to pay their debts, close their affairs, and settle with their stockholders on terms most advantageous to them": *Id.* 404, 405. So also it was held that the whole property of the corporation might be sold to a new corporation, and the shares of the new corporation taken in payment, to be distributed among those of the old stockholders who were willing to take them. The court say: "Nor can we see anything in the proposed sale to a new corporation and the receipt of their stock in payment which makes the transaction illegal. It is not a sale by a trustee to himself for his own benefit, but it

is a sale to another corporation for the benefit and with the consent of the *cestuis que trust*, the old stockholders. The new stock is taken in lieu of money, to be distributed among those stockholders who are willing to receive it, or to be converted into money by those who do not desire to retain it. Being done fairly, and not collusively, as a mode of payment for the property of the corporation, that transaction is not open to valid objection by a minority of the stockholders: *Hodges v. New England Screw Co.*, 1 R. I. 347, 405, 406 [53 Am. Dec. 624].” So in *Sargent v. Webster*, 13 Met. 498 [46 Am. Dec. 743], it was held that the directors of an insolvent manufacturing corporation have authority to convey all the property of the corporation to one of its creditors, upon condition that he shall apply the property to the payment of his claim, and pay over the surplus, if any, to the treasurer of the corporation. Say the court: “Nor does it appear that the proceeding was not in furtherance of the purposes of the corporation. It was a trading corporation, and one of their purposes was to pay their debts, to enable them either to go on successfully again, by the aid of new assessments, or to wind up and settle upon terms most advantageous to the stockholders”: *Id.* 503, 504.

These are but examples of cases in which it may be in furtherance of the purposes of a corporation, like the one in question, to convey a part or all of its property, and in making such conveyance for such purpose the corporation would be acting within the general scope of its powers.

In the case now under consideration, it may be that a point had been reached whence it was impracticable to advantageously proceed in the original undertaking, and that the formation of a new corporation, and conveyance to it of the property of two competing corporations, thus uniting all interests under one management, would subserve the interests of all concerned, and of the public. It appears that after the two old competing corporations had conveyed to the new one, the latter paid off large encumbrances before created by the former, so that the Miners' Ditch Company must have been largely in debt. After the conveyance, when all competition had ceased,—and it may be supposed that the business with the monopoly of the water would be most profitable,—the new corporation was compelled to borrow large sums of money, mortgage its property, and finally deliver possession to the mortgagee, after which the interest of said corporation was sold out by the sheriff. This shows that it is possible, if not

probable, that the affairs of the Miners' Ditch Company had reached a condition in which the legitimate purposes of the corporation could only be subserved by a sale of its property for the payment of its debts. It shows at least that circumstances might exist which would require a sale for the lawful purposes of the corporation,—circumstances under which the property of the corporation, if not sold upon better terms by the corporation itself, might be sold *in invitum* at a loss, and the interests of both stockholders and creditors sacrificed by a forced sale under the hammer of the sheriff.

It is very clear to our minds that many circumstances might arise, in view of which the lawful purposes of the corporation might require a sale and conveyance of a part, or of all, the property of the Miners' Ditch Company. The power to sell, and the power to make a conveyance in pursuance of the sale, exists. Under many circumstances, the question as to want of power, in the given case, cannot be determined by a mere comparison of the fact of a conveyance, and the terms of the deed executed, with the powers granted by the charter. If the conveyance of the corporate property in a given instance is *ultra vires*, in view of the purposes for which they are made, then the want of power "depends not merely upon the law under which the corporation acts, but upon extrinsic facts, resting peculiarly within the knowledge of the corporate officers," and, as we have seen, the invalidity of the sale is not available to the corporation in contests arising between the corporation itself, and strangers dealing with it, without knowledge in fact of the alleged purpose. The corporation has power to make a sale, and power to execute a deed for a lawful purpose, and where the duly appointed officers assume to make a sale or conveyance, strangers dealing with it have a right to suppose the purpose lawful. So if the corporation could convey at all, it could convey to any person, natural or artificial, capable of taking. The Miners' Ditch Company might, for a lawful purpose, have conveyed to the Eureka Lake Company, and if the Eureka Lake Company, why not to the Eureka Lake Water Company? The latter was a legal corporation. There was nothing in the law to prevent the stockholders of either, or both of the old corporations, from incorporating themselves into one or a dozen other companies; and each new corporation formed would be a distinct and complete legal entity, having a separate and independent existence,

with all the functions and powers conferred upon it by the law under which it came into existence.

There is nothing in *Abbott v. American Hard Rubber Co.*, 33 Barb. 580, or *Conro v. Port Henry Iron Co.*, 12 Id. 64, and cases of that class, or any others that have been brought to our notice, in conflict with anything contained in the views here expressed. The former was an action by stockholders against the directors and corporation and others, who were *particeps criminis*, to set aside a transfer of all the property of the corporation made in fraud of the rights of the complainants: 33 Id. 594, 595. In view of the facts of that case, the court very properly say: "The experiment of the acting trustees in the two hard-rubber companies has the merit of boldness as well as originality. Three of them marched out of the old company, laden with spoils with which they enriched themselves as stockholders of the new, and it cannot be that their wronged and injured associates are remediless": Id. 595. The discussion of the law must be considered with reference to the facts of the case. The latter was a case in equity between the creditors, on one side, and the corporation and other parties to the wrongful acts complained of, with knowledge of their illegality. The transfer affirmatively appeared not to be the act of the corporation. There was a breach of trust, and acts fraudulent as to creditors, and the proceedings to set aside the transfers were had by creditors in pursuance of express statutory provisions applicable to such cases: 12 Id. 62, 63, 64. A very cursory examination is sufficient to show that there is nothing in the case in conflict with the views expressed in this opinion.

The next point is, that the deed of October 20, 1860, from the Miners' Ditch Company to the Eureka Lake Water Company, is void, because not authorized by the board of trustees acting as a board. In *Gashwiler v. Willis*, 33 Cal. 16 [91 Am. Dec. 607], we held a conveyance executed by the trustees individually in pursuance of a resolution of the stockholders of a mining corporation, without any authority from the board of trustees acting as a board, and not having the corporate seal attached, to be void for want of authority to execute it; and we find no reason to be dissatisfied with that decision. But in that case the party offering the deed made it affirmatively appear under what precise authority the act was performed, and there was no corporate seal affixed. The parties severally used their private seals, for the reason that there

was no corporate seal, and in such cases we held that authority to execute the deed, and by implication, at least, to adopt a seal *pro hac vice* by the party assuming that power, must be shown. The seal affixed must of course be shown to be the corporate seal. These facts were not shown, and the deed was held to be inadmissible till further proof should be made. We expressly reserved the question as to what the rule would be where the regularly adopted corporate seal is shown by competent proof to be affixed to the deed: *Id.* 19. This precise question is now presented. The instrument in question purports on its face to be an "indenture . . . between the Miners' Ditch Company, a corporation duly organized by law, . . . party of the first part," and the Eureka Lake Water Company, of the second part. It concludes: "In witness whereof, the said party of the first part hath hereunto set its hand and seal, the day and year first above written, by its trustees thereunto duly authorized." Signed by five parties, as trustees, with the corporate seal affixed. It is admitted in the replication, and found by the court, that the parties thus signing were, at the time of the signing, the trustees, and that the seal affixed is the corporate seal, and that they signed the instrument and affixed the seal.

Upon this state of facts appearing, the deed was admissible in evidence, and being in, was *prima facie* evidence of the regular and duly authorized execution of the deed. This point is settled by the decisions. Angell and Ames state the rule deduced from the authorities thus: "Where the common seal of a corporation appears to be affixed to an instrument, and the signatures of the proper officers are proved, courts are to presume that the officers did not exceed their authority, and the seal itself is *prima facie* evidence that it was affixed by the proper authority. The contrary must be shown by the objecting party": Angell and Ames on Corporations, sec. 224. The supreme court of the United States say: "This mortgage had the corporate seal attached, and the presumption was, that it was there rightfully, and the court properly admitted it to be read in evidence": *Kahler v. Black River Falls Iron Co.*, 2 Black, 717. Mr. Chief Justice Shaw says: "In the first place, the deed, duly executed by the corporate seal of the bank, and produced by the party claiming under it, is *prima facie* a good title, and it is for those who wish to set it aside to impeach it": *Burrill v. Bank of Nahant*, 2 Met. 166 [35 Am. Dec. 395]. And Mr. Chancellor Walworth states the rule thus: "The seal

of a corporation aggregate affixed to a deed is of itself *prima facie* evidence that it was so affixed by the authority of the corporation, especially if it is proved to have been put to the deed by an officer who was intrusted by the corporation with the custody of such seal: See 1 Kyd on Corporations; and Angell and Ames on Corporations, sec. 115. And it lies with the party objecting to the due execution of the deed to show that the corporate seal was affixed to it surreptitiously or improperly; and that all the preliminary steps to authorize the officer having the legal custody of the seal to affix it to the deed had not been complied with": *Lovett v. Steam Sawmill Association*, 6 Paige, 60. To the same effect are the following cases: *Leggett v. New Jersey M. & B. Co.*, 1 N. J. Eq. 559 [23 Am. Dec. 728]; *Levering v. Mayor etc.*, 7 Humph. 558; *Hoyt v. Thompson*, 5 N. Y. 335; S. C., 3 Sand. 428, and 3 Bosw. 285; *Jackson v. Campbell*, 5 Wend. 575; *Flint v. Clinton Company*, 12 N. H. 433; *Hill v. Manchester and Salford W. W. Co.*, 5 Barn. & Adol. 874; *Clarke v. Imperial Gaslight Co.*, 4 Id. 326; *Berks and Daup. Tp. Co. v. Myers*, 6 Serg. & R. 13, 15 [9 Am. Dec. 402].

The rule must be as stated on principle, independent of authority. Any other would be subversive of the public interests; for no man could deal in safety with corporations, and all business transactions with these institutions would almost necessarily cease, and the end of their creation fail of accomplishment. Confidence is a necessary element in all business transactions. If strangers cannot rely, at least *prima facie*, upon deeds of private corporations apparently regularly executed in pursuance of the powers conferred by their charters, under the corporate seal, and attested by the signatures of the officers, upon whom the control of their affairs is devolved by law, upon what may they rely? This is the most direct, formal, and solemn assurance that can possibly be given by those authorized to give assurances. It is the legally appointed mode in which the corporation speaks to the external world, and manifests its corporate will. Parties dealing with private corporations have no other reliable means of ascertaining the circumstances under which the act is done. The books, records, and papers of such corporations are private property, and not open to inspection by strangers. Many, if not in practice most, of their corporate acts are not made matters of record. Besides, it is as easy to make a false statement in some other mode—by a false record—as by a false deed.

Whatever is done must be done through agents, and if their most formal and solemn assurances under the corporate seal are not reliable, then none of their acts can be depended on, and those dealing with corporations are absolutely without the means of self-protection. The rule established rests upon a foundation of solid sense. If this is not the rule, then, surely, there is too much truth in the saying that corporations are intangible, impersonal, irresponsible, soulless, artificial beings, endowed with a capacity to accumulate and enjoy property, and exercise most of the functions and privileges pertaining to natural, material persons, but under no moral restraints, and subject to few of the implications and responsibilities to which natural persons are liable, and the less men have to do with them the better it will be for them.

If it be conceded, then, that the corporation, in a contest with a party purchasing in good faith for a valuable consideration, relying upon the presumption arising upon the face of a deed apparently regularly executed under the corporate seal, and by the officers upon whom the law confers the corporate powers, may rebut the presumption (upon which point we now express no opinion), it is clear from the authorities cited that the burden of overthrowing the presumption in this case rested upon the corporation,—the party denying the validity of the deed.

Upon the facts admitted and found then, notwithstanding the denial of authority by plaintiff *prima facie*, the presumption arises, and it affirmatively appears in favor of defendant Zellerbach that the deed was executed by authority of the corporation. Aside from the presumption, although it is found that it did not affirmatively appear from the other evidence whether the authority was conferred at a meeting of the stockholders only, or at a meeting of the board of directors, or of both, still, since the burden of overthrowing the presumption is on the corporation, it is sufficient for defendant Zellerbach that the contrary did not affirmatively appear.

It is claimed also that the testimony does not justify the finding of the court to the effect that the exact character of the meeting in September, at which the trustees were authorized to convey the property of the Miners' Ditch Company, as whether a meeting of stockholders or of the trustees, as a meeting of both, is not clearly shown, and inferentially therefrom the finding against the plaintiff on the issue, or to

the authority of the trustees to execute the deed. We should not be justified in setting aside the finding on this point. The evidence is very loose, at best, and we should expect to find it so. It must be remembered that the business was loosely done, and no minutes appear to have been preserved. The meeting was held nearly seven years before the date of the finding. For five years after that time, there had been no other meeting of directors. The grantee under the deed had been in the continued possession, expending large sums of money on the property conveyed under a claim of ownership. And neither the corporation, the trustees, nor the stockholders, from the date of the deed, set up any claim, or suggested any doubt as to the validity of the conveyance. After so long silence on the part of those interested, under the circumstances of this case, there certainly should be required some very clear and conclusive testimony on the part of the plaintiff to justify the court below in finding affirmatively facts to overthrow the presumption raised by the law upon the other facts clearly established and found, and as to which finding the exception was taken. We think the finding of the court clearly justified. The burden of overthrowing the presumption raised by the deed rested on the plaintiff, and we do not think it overthrown.

To recapitulate, and apply the principles of law stated: Prior to the 29th of October, 1860, the Miners' Ditch Company, a corporation duly organized, was the owner, and in possession of the property in suit. On that day, a deed of conveyance was executed in the name and on behalf and purporting to be by the authority of the corporation by its trustees, and under the corporate seal affixed by said trustees, by which said property is purported to have been conveyed to the Eureka Lake Water Company, another corporation duly organized, and capable of receiving a conveyance of such property, and the possession was delivered to and received by said latter corporation. The last-named corporation continued in possession of said property, claiming to be the owner under said conveyance, and from time to time made improvements on it to the amount of at least fifty thousand dollars, and paid off liens and mortgages created by the Miners' Ditch Company to the amount of at least ninety thousand dollars more.

After the Eureka Lake Water Company had thus been in possession continuously, improving and claiming it as its own, for a period of some two years, in 1862 it mortgaged the prop-

erty to the defendants, Zellerbach and Powers, two strangers, to secure the sum of two hundred thousand dollars, advanced and to be advanced, and all of which was in fact advanced to said company, on the faith of its title, before January, 1863. On the 3d of January, 1863, said company placed the property in the hands of the mortgagees, with authority to manage and apply the profits in satisfaction of the mortgage. Said defendants, under this agreement, continued so in possession till February 5, 1865, at which time they acquired the title of the Eureka Lake Water Company through a sale by the sheriff on a judgment in favor of one Martin against said company. Said mortgage had not been satisfied or paid by the rents and profits, or otherwise. No objection was made to said transfer to the Eureka Lake Water Company, or claim to said property set up by the Miners' Ditch Company, its trustees or stockholders, from the date of the deed in 1860, till the fall of 1865, a short time before the commencement of this suit. The Miners' Ditch Company had power to sell the property, and to make such a deed as was made for a proper purpose. Upon the face of the charter and the deed, the power existed. A comparison of the deed with the charter disclosed no want of authority. If any existed, it arose from extrinsic facts, which rested in the knowledge of the corporation and its agents alone, and which strangers had no means of discovering. Under the authorities cited, and upon principle, strangers dealing with the corporation, in ignorance of any extrinsic facts affecting the question of authority, were entitled to rely upon the apparent power. The deed itself was executed under the corporate seal, signed by the officers appointed by law to control the affairs of the corporation, duly acknowledged and recorded. It carried upon its face, in the mode appointed by law, the most solemn assurance which the corporation or its officers were capable of giving, that the corporate assent had been given, and that everything had been done in pursuance of authority given by the board of trustees. The presumption, *prima facie* at least, that authority to execute the deed was given in such a manner as to render the deed a valid, corporate act, was thus raised, and this presumption was not overthrown by proof on the part of the corporation, upon which the burden of proof rested. Title, therefore, was affirmatively shown in defendant Zellerbach, and not overthrown by other evidence.

We need not inquire whether the conveyance could have

been avoided by stockholders, or creditors, or the corporation itself, as between the Miners' Ditch Company and the Eureka Lake Water Company, on the ground that the latter was affected with notice of the illegal purpose, if any such there was, for which the Miners' Ditch Company made the conveyance, or whether there was in fact any illegal purpose; for the contest is not between those parties. The contest is between the Miners' Ditch Company and Zellerbach alone. Zellerbach, a stranger without notice, — for none is found on his part, — found the Eureka Lake Water Company in undisputed possession, expending vast amounts of money in improving and enlarging the works and paying off mortgages, claiming title under a deed regular on its face and apparently executed in pursuance of authority granted by the charter. On the faith of these appearances, he advanced two hundred thousand dollars, and subsequently took possession under an arrangement with the company, and finally purchased its interest under a sheriff's sale made at the instance of another creditor. He is therefore not affected by any knowledge of or participation in any wrongful acts of the Miners' Ditch Company on the part of the Eureka Lake Water Company. He is certainly in no worse position than he would be if he had been a purchaser directly from the Miners' Ditch Company, without knowledge of any illegal purpose in the sale, or defect of authority in the execution of the deed. Zellerbach is in no way affected by any of those latent vices not brought to his notice, if any there be, which affected the transaction between the two corporations.

This suit is not brought by a stockholder or a creditor. No person having an equitable interest has complained that the officers and trustees have exceeded their authority, or violated the trust reposed in them, to his injury. The corporation itself is plaintiff. After a five years' acquiescence, and long after the property has passed into the hands of innocent parties, who have advanced vast sums of money upon the faith of its apparent acts, paid off large liens, and greatly extended, improved, and increased the value of the property, this corporation seeks to avoid its deed. In the language of the court below, the plaintiff says: "True, the deed is apparently mine. I made it in the only way in which I could have made it, — through my trustees, and by my corporate seal; but in the internal and secret machinery of my existence, the determination to make it was not regularly and properly arrived at. It is as

though a natural person sought to avoid his deed by saying: 'True, my hand executed it, but my judgment dissented, and my will forbade it.'"

Upon the facts found, we do not see how the result could have been otherwise, had the plaintiff been a stockholder or a creditor. But however that may be, it is entirely clear to our minds that the district court was right in finding and adjudging that the title of Marks Zellerbach to the property in controversy "is a good and valid title in law and equity, as against the Miners' Ditch Company," the plaintiff in this action, and that the judgment should be affirmed.

Numerous authorities were cited in the arguments of counsel, which we have not particularly noticed, for the reason that they do not appear to be opposed to the views we have expressed. Rights growing out of corporate relations are presented under a great variety of circumstances, and discussed in various aspects, but the distinctions are obvious enough to those who peruse the numerous decisions, and it would be unprofitable labor to comment upon and distinguish each particular case. Suffice it to say, that we find nothing in the general current of authorities cited opposed to the principles upon which this case is determined. We have said nothing to impugn the general doctrine so well established that the act of incorporation is an enabling act, and corporations can only exercise such powers as are expressly conferred upon them, together with such incidental powers as are necessary to a due exercise of those expressed, and that the powers must be exercised in the mode prescribed. Nor do we find it necessary to notice the distinction, if any there is, between common-law and statutory corporations. It is presumed that no commercial, trading, manufacturing, and such like corporations, created since the Revolution in this country, exist, which do not derive their existence under some statute; and probably, too, such is the case in most similar modern corporations in England. Most of the decisions upon the subject must, therefore, relate to statutory corporations.

Let the judgment be affirmed.

By Court, SAWYER, C. J. (on petition for rehearing). Defendant Zellerbach is the only one interested in the property in dispute. In rendering the decision in this case, we proceeded upon the idea that he did not appear in the record to have any knowledge of the purpose of the Miners' Ditch Company, in its conveyance to the Eureka Lake Water

Company, to distribute the stock of the latter company, received as the consideration of the conveyance, to the stockholders of the former, which is the fact in the case, if any there is, that renders the transaction between those corporations illegal. Our attention is now called to a fact, not before brought to our notice by counsel, and overlooked when the opinion was written, that in the answer of Zellerbach, stating the loan of money through which the title was ultimately acquired by him, it is averred that the Eureka Lake Water Company "borrowed of this defendant and the defendant Powers (then partners in business under the firm of Marks & Co.) the sum," etc. It also appears in the findings that one George C. Powers signed, as trustee, the conveyance of the Miners' Ditch Company to the Eureka Lake Water Company; and it is claimed that, as this is the same name as that of defendant Powers, it must be presumed that the Powers who signed the deed and who advanced the money as the partner of Zellerbach is the same person; that notice to one of the partners is notice to all; and that it therefore appears in the record that Zellerbach did have notice. Conceding this to be so, for the purposes of the decision, it becomes necessary to determine the point whether, upon that hypothesis, the Miners' Ditch Company stands in a position to avail itself of the illegality of its contract to distribute its capital stock to the stockholders of the corporation, by conveying its property and distributing the stock of another corporation received in payment, in the mode and under the circumstances stated in our former opinion, to its stockholders. And we are of the opinion that it does not. The act of sale and conveyance was not wholly beyond the power of the corporation to perform. It had full power to sell and convey its property. It is provided that it shall not be lawful for the trustees to divide or withdraw any portion of the capital stock. The corporation having power to sell and convey its property, but it being made unlawful for the trustees to divide the capital stock, the corporation stood upon the same footing in respect to such conveyance as any natural person with reference to a contract which he has the power to make, but which is made unlawful upon some principle of public policy adopted by the law-making power. In this case the contract was wholly executed. There was nothing of an executory character left on either side. The conveyance was fully made by the Miners' Ditch Company to the Eureka Lake Water Company, and the

grantee put completely in possession, and remained for years in such possession, with the knowledge and acquiescence of both the corporation and its stockholders. While so in possession, it executed its mortgage to Zellerbach and Powers, for the large sums of money advanced by them, and put them in possession, and this mortgage was subsequently foreclosed, and under the judgment of the court the property was sold and purchased in by them, and the defendant, having now acquired the entire title, is in possession. Large portions of the money advanced went in satisfaction of debts due from the Miners' Ditch Company. At all events, the defendant was in possession under his conveyance, and the contracts were all fully executed on both sides, each having received and enjoyed the consideration. There was nothing of an executory character left. It is not sought by either party in this action to recover on any branch of an executory contract,—the usual form in which questions in such cases are presented. The question is, which party, in fact, has the title, as the case now stands; and, as between those parties, it is clearly in the defendant. We know of no instance in which the grantor has been able to recover at law when the contract has been fully executed, as in this case. *A fortiori*, he would not be entitled to relief in equity. But in the worst view that can be taken for the defendant, the maxim applied in suits on illegal executory contracts, *In pari delicto, potior est conditio possidentis, or defendantis*, would apply, and justify an affirmance of the judgment. But the defendant is in a better position than if sued on an executory contract: See *Schermerhorn v. Salmon*, 14 N. Y. 141. The contract is fully executed on both sides, and the transaction closed between them. The case of *Inhabitants of Worcester v. Eaton*, 11 Mass. 368 [7 Am. Dec. 155], is precisely in point. The only difference is, in that case the grantor in the illegal deed is a natural person, and here it is a corporation. But with reference to the inherent power of the two persons to make a conveyance of the property conveyed, the parties stand on the same footing. The vice in both conveyances, if any there be, is, that the contract is illegal for similar reasons. The principle is, therefore, the same. The consideration of the conveyance in the case cited was a composition of a felony. Yet, the contract being fully executed, it was held to pass the title, and could not be avoided, so as to authorize a recovery by the grantor, or, which is the same thing, by the subsequent grantee of the grantor, and this when an

entry had been made for the very purpose of avoiding the deed. The case is in point, and we know of none to the contrary; besides, we believe it to be sound.

The plaintiff, however, claims the benefit of the maxim, because the defendant sets up the facts and prays affirmative relief. But we think the defendant, and not the plaintiff, is the party entitled to the benefit in this case. The defendant is in possession, and has been in possession for many years, with the acquiescence both of plaintiff and the stockholders, who have received and long enjoyed the consideration for the conveyance. The plaintiff brings the action to recover possession of the property conveyed. The defendants, to defeat a recovery, although it is unnecessary, set up the facts in their answer, as a defense; and the court finds the facts in favor of the defendants, and holds upon the facts, as stated and found, that defendant has a title both in law and equity, and so adjudges. And this is undoubtedly so. The facts constitute a legal as well as an equitable defense, and there is no necessity whatever for any equitable or affirmative relief. It was only necessary, upon the facts alleged and found, to enter a judgment that plaintiff take nothing by his action. This is not the exact form of the judgment, but it is substantially that, and is no more extensive in its operation as to the matters adjudged than it would be in that form. Technically, it might just as well be in that form, and as a plea of *res adjudicata*, in another suit, it would cover the same issues. In effect, the relief is no more as it is than the ordinary judgment against plaintiff in an action for possession. In form, however, it adjudges the title to be in Zellerbach, and that, as between the parties, the plaintiff has no title. That is to say, the judgment simply adjudges what the present state of the title under the executed agreement, as between the parties, really is. It goes no further. It grants no active relief. It gives nothing on any executory promise. It does not change the position of the parties. It only determines what that position is, and leaves them in it. What before existed in fact and in law is simply adjudged to exist. It is now *res adjudicata*, and not open to further dispute. And this the court would have determined as the basis of the judgment, although it would not have so expressed it in terms in the judgment, had the judgment been that the plaintiff take nothing by his action. But under the issues upon which such a judgment would have been entered, and the judgment in pursuance thereof, the

same matters would have been *res adjudicata*, as under the present form of the judgment. In substance, then, the parties are left in the same condition in which the suit found them, as to their rights. We will look to the substance of the thing done, and not to the form, especially in a case like this, where it is clearly manifest that an outrageous injustice would be perpetrated upon the defendant, as between the parties to this action, if under ordinary circumstances they could be compelled to surrender this property to the plaintiff without a return of the vast sums of money they have advanced to obtain it, and in a case also, where it is quite apparent that none of the parties to the original transaction in fact meditated any wrong. We have no idea that any of the parties at the time of the original conveyance supposed for a moment that they were performing any illegal act.

Rehearing denied.

SANDERSON, J., did not express an opinion on the question of granting a rehearing.

CORPORATIONS, POWERS OF, IN GENERAL: *City of Galena v. Corwith*, 95 Am. Dec. 557, and note 559; *Rock River Bank v. Sherwood*, 78 Id. 669; powers of, how exercised: *Gashwiler v. Willis*, 91 Id. 607, and note 616; where contract of, not *ultra vires*: *Pizley v. Western Pac. R. R. Co.*, 91 Id. 623; *Blunt v. Walker*, 78 Id. 718, note; *Tracy v. Talmage*, 67 Id. 132, and note 153; *Old Colony R. R. Co. v. Evans*, 66 Id. 394.

POWER OF DIRECTORS TO SELL REAL ESTATE OF CORPORATION: *Buell v. Buckingham*, 85 Am. Dec. 516, and see note 525.

POWER OF CORPORATION TO ALIENATE FRANCHISE TO BE CORPORATION: See *Coe v. Railroad Co.*, 75 Am. Dec. 518, 548, note; *People v. Railroad Co.*, 82 Id. 295; *Story v. Plank Road Co.*, 84 Id. 134.

POWER OF OFFICERS OF CORPORATIONS TO ALIENATE THEIR REALTY, and mode of exercising: *Leggett v. N. J. Mfg. etc. Co.*, 23 Am. Dec. 728, and extended note 740.

SALE BY CORPORATION OF ALL ITS ASSETS, AND EFFECT THEREOF. — There are at common law certain powers incident to corporations, and these they must be presumed to possess, in the absence of special restraint in their charters, or by statute. They are such powers as are necessary and proper to enable the corporation to accomplish the purposes of its creation, and though not expressly conferred by the charter or act of incorporation, are deemed to be inseparable from every corporation: See *Downing v. Mt. Washington Co.*, 40 N. H. 230; *Gaines v. Coates*, 51 Miss. 335; *Rochester Ins. Co. v. Martin*, 13 Minn. 59; *Hood v. Railroad Co.*, 22 Conn. 1; Boone on Corporations, sec. 37. Thus the general power to dispose of and alienate its property is incidental to every corporation not restricted in this respect by express legislation, or by the purposes for which it is created, and the nature of the duties and liabilities imposed by its charter: *Commonwealth v. Smith*, 10 Allen, 448; *Bufet v. Troy etc. R. R. Co.*, 40 N. Y. 176; *Hood v. Railroad*

Co., 22 Conn. 1; *Barry v. Merchants' Ex. Co.*, 1 Sand. Ch. 280, 289. Except when so restricted, all corporations have the absolute *jus disponendi*, and in its exercise are unlimited as to objects, circumstances, or quantity: *Id.*; 2 Kent's Com. 281; *Burton's Appeal*, 57 Pa. St. 213; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439, 451; *Binney's Case*, 2 Bland, 142. They may alienate and dispose of both lands and chattels as fully as any individual may do in respect to his own property: *Ardesco Oil Co. v. N. A. Min. etc. Co.*, 66 Pa. St. 375, 382; *State v. College of California*, 38 Cal. 161, 166, citing the principal case; and a corporation which can dispose of its property may, in general, dispose of any interest in the same as it deems expedient: *Barry v. Merchants' Ex. Co.*, 1 Sand. Ch. 280; *White Water Valley Canal Co. v. Vallette*, 21 How. 424; *Kelly v. Trustees etc.*, 58 Ala. 489, 496; *Richardson v. Sibley*, 11 Allen, 65; *Pierce v. Emery*, 32 N. H. 486; and see *Clark v. Titcomb*, 42 Barb. 122; *Cent. Gold Min. Co. v. Platt*, 3 Daly, 263; *United States Bank v. Huth*, 4 B. Mon. 423; and may, unless restrained by statute or otherwise, dispose of the whole of its corporate property for any lawful purpose: *State v. College of California*, 38 Cal. 166, 171, citing the principal case; *Webster v. Turner*, 12 Hun, 264; *Ardesco Oil Co. v. N. A. Min. Co.*, 66 Pa. St. 375, 382.

The foregoing general rules are clearly applicable to corporations of a strictly private character, established solely for trading or manufacturing purposes, and in the business or management of which neither the public nor the legislature have any direct interest: See *State v. College of California*, 38 Cal. 166; *Commonwealth v. Smith*, 10 Allen, 448, 456; *Webster v. Turner*, 12 Hun, 264; *Hancock v. Holbrook*, 4 Woods, 52; *Sheldon Hat Blocking Co. v. Hickemeyer etc. Machine Co.*, 90 N. Y. 607; S. C., 64 How. Pr. 467; *Dupee v. Boston Water Power Co.*, 114 Mass. 37; and they are also held to apply in cases of quasi public corporations, such as railway and other transportation companies, when the question does not concern the demands of public policy, but only the contract rights of the individual stockholder: *Buford v. Keokuk etc. Packet Co.*, 3 Mo. App. 159; and the officers of such a corporation, which is on the eve of dissolution by the operation of law, may, in the exercise of a sound discretion, transfer its assets to another corporation, and take in payment the stock of such other, and convert it into money, for the purposes of liquidation: *Id.*; S. C. affirmed, 69 Mo. 611; and see *Wilson v. Proprietors of Central Bridge*, 9 R. I. 590, 598. But, as a general rule, corporations established for objects quasi public, such as railway, canal, and turnpike corporations, to which large powers are given to enable them to accommodate the public, are disabled to do any act amounting to a renunciation of their duty to the public, or which directly and necessarily disable them from performing it: *Richards v. Railroad Co.*, 44 N. H. 127, 136; *Peoria etc. R. R. Co. v. Coal Valley Mfg. Co.*, 68 Ill. 489. And any contract made by such corporation, which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burdens which it imposes, is held to be a violation of the contract with the state, and is void, as against public policy: *Thomas v. Railroad Co.*, 101 U. S. 71, 83; *Pennsylvania R. R. Co. v. St. Louis etc. R. R. Co.*, 118 Id. 290; *Troy etc. R. R. Co. v. Boston etc. R. R. Co.*, 86 N. Y. 107; *Fanning v. Osborne*, 102 Id. 441; *Stewart's Appeal*, 56 Pa. St. 413; *Commonwealth v. Smith*, 114 Mass. 448, 456; *Middlesex R. R. Co. v. Boston etc. R. R. Co.*, 115 Id. 347; *Branch v. Jesup*, 106 U. S. 468, 484. But although a railroad company, for instance, cannot transfer, sell, or convey its charter or franchise to be a corporation, unless authorized by law so to do, — see *State v. Sherman*, 22 Ohio St. 428; *Meyer v. Johnson*, 53 Ala. 237, 325; *Eldridge v. Smith*, 34 Vt.

484, — yet it has been held that the franchises to build, own, and manage a railroad, and to take toll thereon, are not necessarily corporate rights, but are capable of being enjoyed by natural persons, and may be transferred by the corporation possessing them: *Ragan v. Aiken*, 9 Lea, 609; but see *Randolph v. Larned*, 27 N. J. Eq. 557, 561, holding that the franchises of a railroad company are property of a peculiar character, arising only from legislative grant, and are not, in ordinary cases, subject to execution or to sale and transfer, even in payment of the debts of the corporation, without the assent or authority of the legislature; and see *Coe v. Columbus etc. R. R. Co.*, 10 Ohio St. 372; *Carpenter v. Black Hawk Gold Mining Co.*, 65 N. Y. 43, 50; *Stewart v. Jones*, 40 Mo. 140; *Gibbs v. Drew*, 16 Fla. 147; S. C., 26 Am. Rep. 700; *Wood v. Turnpikes Co.*, 24 Cal. 474; *Youngman v. Railroad Co.*, 65 Pa. St. 278.

A majority of the share-holders in a solvent and prosperous corporation cannot, at their own mere caprice, sell out the entire property of the corporation, and invest their capital in other enterprises, where the minority desire the prosecution of the business in which they had engaged: *Kean v. Johnson*, 9 N. J. Eq. 401; and to the same effect, see *McCurdy v. Myers*, 44 Pa. St. 535; *Boston etc. R. R. Co. v. New York etc. R. R. Co.*, 13 R. I. 260; *Clinch v. Financial Co.*, L. R. 4 Ch. 117. The directors, even with the consent of a majority of the share-holders, have no right, as against stockholders not consenting, thus in effect to discontinue the existence of the corporation, and defeat the object of its organization: *Abbott v. American Hard Rubber Co.*, 21 How. Pr. 193; S. C., 33 Barb. 578; and see *Barclay v. Quicksilver Min. Co.*, 9 Abb. Pr., N. S., 284; *Middlesex R. R. Co. v. Boston etc. R. R. Co.*, 115 Mass. 347; *Balliet v. Brown*, 103 Pa. St. 546. It is of the essence of the implied contract of association that the majority shall not control the corporate powers to pervert or destroy the original purposes of the corporators: *Livingston v. Lynch*, 4 Johns. Ch. 573; *Rollins v. Clay*, 33 Me. 132; *Ervin v. Oregon etc. Nav. Co.*, 23 Blatchf. 517; *Copeland v. Citizens' G. L. Co.*, 61 Barb. 60. But if the corporation be an unprofitable and impracticable enterprise, in failing circumstances, a majority of the share-holders may sell the whole of the corporate property, with a view to dissolution: *Lauman v. Lebanon Valley R. R. Co.*, 30 Pa. St. 42. And a conveyance under the authority of the board of directors, whose action is subsequently ratified by the holders of all the stock represented at a meeting of the stockholders, of the total assets of a private corporation in payment of its sole debt, operates as a valid conveyance of the property, as against other stockholders, in the absence of fraud, and when a longer continuance of the business would be ruinous: *Hancock v. Holbrook*, 4 Wood, 52; S. C., 9 Fed. Rep. 353; and see *Sheldon Hat Blocking Co. v. Eickemeyer etc. Machine Co.*, 90 N. Y. 607; S. C., 64 How. Pr. 467. So when a corporation becomes embarrassed, and unable to meet its obligations in the usual course of business, it is competent for the directors to make an assignment for the benefit of creditors; and this they may do, not only without the consent, but even against the expressed will of the stockholders: *Hutchinson v. Green*, 91 Mo. 367; and see *Chew v. Ellingwood*, 86 Id. 260; *De Camp v. Alward*, 52 Ind. 473; *Dana v. Bank of United States*, 5 Watts & S. 223.

The directors or officers of a corporation cannot convey the corporate property to themselves: *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639; and see *Jackson v. Ludeling*, 21 Wall. 616. And where the trustees attempt, through the form of a sale, to secure to themselves the corporate property at the expense of the other share-holders, the sale is voidable as to the share-

holders not consenting, though a majority agreed to the transaction: *Abbott v. American Hard Rubber Co.*, 33 Barb. 580; and see *Mentor v. Hooper's Tel. Works*, L. R. 9 Ch. 350, 354. The minority have an equitable lien, to the extent of their interest, upon the corporate property which has been sold by the majority to themselves, in breach of their fiduciary relation: *Erwin v. Oregon etc. Nav. Co.*, 23 Blatchf. 517. Nor have the directors, or a majority of the stockholders, power to transfer all the corporate property, and take in payment the stock of another corporation, and force it upon dissenting stockholders: *Taylor v. Earle*, 8 Hun, 1; *Frothingham v. Barney*, 6 Id. 306. A dissenting member cannot thus be forced into a new corporation by the act, either of the legislature or of his co-corporators, or of both combined: *Lawman v. Lebanon Valley R. R. Co.*, 30 Pa. St. 42, 47; and see *McCurdy v. Meyers*, 44 Id. 535; *State v. Bailey*, 16 Ind. 46; *Kelly v. Mariposa etc. Co.*, 4 Hun, 632; *Zabrickie v. Railroad Co.*, 18 N. J. Eq. 183; *Black v. Delaware etc. Canal Co.*, 24 Id. 455, 467; *Featherstonhaugh v. Lee Moor etc. Co.*, L. R. 1 Eq. 318.

The sale and assignment by a corporation of all its property, in good faith and for a valuable consideration, will not *per se* accomplish its dissolution, or operate as a surrender of its franchises: *Hill v. Fogg*, 41 Mo. 563; *Kansas City Hotel Co. v. Sauer*, 65 Id. 279; *Bruffett v. Railroad Co.*, 25 Ill. 353; *Richwald v. Commercial Hotel Co.*, 106 Id. 439; *De Camp v. Alward*, 52 Ind. 468; *State v. Bank of Maryland*, 6 Gill & J. 205, 230. No corporation, once legally existing, dies, in contemplation of law, without some act forfeiting its franchises; and it will be recognized by the law as long as it carries on its legitimate business in its corporate name, and through agents and persons who use that name in its trade or business: *Newton Mfg. Co. v. White*, 42 Ga. 148. Even when one person becomes the sole owner of all the property of a private corporation, this does not necessarily work a surrender of the company's franchise; and such sole owner may dispose of some of his stock to others, and continue the corporate existence by the election of necessary officers: Id.; *Swift v. Smith*, 65 Md. 428; *Russell v. McClellan*, 14 Pick. 70; compare *Commonwealth v. Cullen*, 13 Pa. St. 133; *Button v. Hoffman*, 61 Wis. 20; *Hopkins v. Roseclare Lead Co.*, 72 Ill. 373. The right of stockholders of a railroad company to meet and elect directors is not affected by the sale of the property of the corporation by a receiver, under an order of the court: *State v. Merchant*, 37 Ohio St. 251; and see *Toledo etc. R. R. Co. v. Beggs*, 85 Ill. 80. So provision by statute for the dissolution of a corporation by a mortgage sale of its franchise and property does not end the corporate existence till after a legal and valid sale: *White Mts. R. R. v. White Mts. R. R.*, 50 N. H. 50; see *Thornton v. Wabash R'y Co.*, 81 N. Y. 462; *Vatable v. Railroad Co.*, 96 Id. 49. But it is held that a corporation which owes no debts may, by a unanimous resolution of the stockholders, dispose of its entire property, and declare itself dissolved; and that this is equivalent to a surrender of its franchise: *Webster v. Turner*, 12 Hun, 264; and see *Graham v. Railroad Co.*, 102 U. S. 148.

At common law, upon the dissolution or civil death of a corporation, its real estate reverted to the original owners or their heirs, its personal property vested in the state or sovereign, and all debts due to or from it were, by operation of law, extinguished: See *Attorney-General v. Gower*, 9 Mod. 224; *State Bank v. State*, 1 Blackf. 267; 8 C., 12 Am. Dec. 234, 239, note; *Greeley v. Smith*, 3 Story, 657; *Miami etc. Co. v. Gano*, 13 Ohio St. 269; *Life Association of America v. Fassett*, 102 Ill. 315, 323; and this doctrine is still upheld by some of the courts: *Coulter v. Robertson*, 24 Miss. 278; *Bank of Mississippi*

v. *Duncan*, 56 Miss. 166; *St. Philip's Church v. Zion etc. Church*, 23 S. C. 297; *Atkin v. Paschal*, 48 Tex. 147; but has been generally rejected in this country, as it respects private moneyed corporations, even in the absence of legislative enactments on the subject: See *Towar v. Hale*, 46 Barb. 361; *Heath v. Barmore*, 50 N. Y. 302; *Lothrop v. Stedman*, 13 Blatchf. 134; *Newfoundland etc. Co. v. Schack*, 40 N. J. Eq. 222; *Curry v. Woodward*, 53 Ala. 371; *McCoy v. Farmer*, 65 Mo. 244; *Haldeman v. Pennsylvania R. R. Co.*, 50 Pa. St. 425. And the prevailing doctrine is, that the capital and debts of moneyed corporations constitute a trust fund and pledge for the payment of creditors and share-holders; and a court of equity will, upon the dissolution or civil death of a corporation, lay hold of the fund, and see that it be duly collected and applied: *Wood v. Dummer*, 3 Mass. 308; *Robinson v. Lane*, 19 Ga. 337; *Lea v. American etc. Canal Co.*, 3 Alb. Pr.; N. S., 1; *Lum v. Robertson*, 6 Wall. 277; *Powell v. Railroad Co.*, 42 Mo. 63; *Lothrop v. Stedman*, 13 Blatchf. 134; *Mining Co. v. Mining Co.*, 116 Ill. 170. The creditors have a lien, or right of priority of payment, in preference to the stockholders: *Hastings v. Drew*, 50 How. Pr. 254; S. C., 76 N. Y. 9; and they may enforce their claims against any property belonging to the corporation which has not passed into the hands of a bona fide purchaser: *Bartlett v. Drew*, 57 Id. 587; S. C., 60 Barb. 648; 4 Lans. 444; *Howe v. Robinson*, 20 Fla. 352; *National Trust Co. v. Miller*, 33 N. J. Eq. 155; *Shields v. Ohio*, 95 U. S. 324. But the stockholders are the owners of the franchise, property, and assets of the corporation, which remain after its debts and liabilities are discharged: *Chetlain v. Republic Life Ins. Co.*, 86 Ill. 220; *St. Louis etc. Min. Co. v. Sandoval etc. Min. Co.*, 116 Id. 170; *Burrall v. Bushwick R. R. Co.*, 76 N. Y. 211; *Krebs v. Carlisle Bank*, 2 Wall. C. C. 33.

Valid contracts made by a corporation survive even its dissolution by voluntary surrender, or sale and transfer of its corporate property and franchises, and the creditors of the corporation, notwithstanding such surrender or sale, may still enforce their claims against the property of the corporation. Moneys derived from the sale and transfer are assets of the corporation, and as such, constitute a fund for the payment of its debts; and if held by the corporation itself, and so invested as to be subject to legal process, the fund may be levied on by such process: *Railroad Co. v. Howard*, 7 Wall. 392, 410. But if the fund has been distributed among the stockholders, or passed into the hands of other than bona fide creditors or purchasers, leaving debts of the corporation unpaid, the rule in equity is, that such holders take the fund charged with the trust in favor of creditors, which a court of equity will enforce, and compel the application of the fund to the payment of their debts: *Id.*; *National Trust Co. v. Miller*, 33 N. J. Eq. 163; *Sawyer v. Hoag*, 17 Wall. 610; *Howe v. Robinson*, 20 Fla. 352; S. C., 10 Am. Corp. Cas. 142; *S. F. etc. R. R. Co. v. Bee*, 48 Cal. 306; and see the cases cited in the preceding paragraph.

THE PRINCIPAL CASE IS CITED and approved as to classification of corporations, in *Hart v. Railroad Co.*, 6 W. Va. 357; it is cited with approval as it respects the doctrine of *ultra vires*, stated in the third point of the syllabus, in *McPherson v. Foster*, 43 Iowa, 65; and is cited and approved to the point that all corporations capable of taking and holding property have the *jus disponentis* as fully as natural persons, except so far as they are restrained by statute, and, under this general power, may dispose of the whole of their property for any lawful purpose, in *People v. College of California*, 38 Cal. 171. It is cited in *Fisk v. Canyon Road Co.*, 5 Or. 307, to the point that in the absence of proof, courts cannot disregard as illegal or unauthorized the dealings

and acts of private corporations which, on their face, or according to their apparent import, are within their charters or articles. It is distinguished in *Martin v. Zellerbach*, 38 Cal. 316, where it is said that the facts are very different, and that the case rests for its solution on wholly different principles from those involved in the principal case.

JONES v. EARL.

[57 CALIFORNIA, 630.]

STOPPAGE IN TRANSITU IS RIGHT WHICH VENDOR OF GOODS upon credit has to retake them, upon the discovery of the insolvency of the vendee, at any time before they have been delivered to him, or before any third person has acquired a *bona fide* right to them.

UPON DEMAND BY VENDOR OF GOODS upon credit, during continuance of the right of stoppage *in transitu*, the carrier becomes liable for conversion if he declines to deliver the goods to the vendor, or delivers them to the vendee.

NOTICE BY VENDOR OF GOODS CLEARLY INFORMING CARRIER that it is the intention and desire of the former to exercise his right of stoppage *in transitu*, is sufficient to charge the latter. And notice to an agent of the carrier, who is in the possession of the goods in the regular course of his agency, is notice to the carrier.

ACTION against a forwarder for the conversion of goods. The facts appear in the opinion. The defendant appealed.

Coffroth and Spaulding, for the appellant.

M. A. Wheaton, for the respondent.

By Court, SANDERSON, J. Stoppage *in transitu* is a right which the vendor of goods upon credit has to recall them, or retake them, upon the discovery of the insolvency of the vendee, before the goods have come into his possession, or any third party has acquired *bona fide* rights in them. It continues so long as the carrier remains in the possession and control of the goods, or until there has been an actual or constructive delivery to the vendee, or some third person has acquired a *bona fide* right to them. Upon demand by the vendor, while the right of stoppage *in transitu* continues, the carrier will become liable for a conversion of the goods, if he decline to redeliver them to the vendor, or delivers them to the vendee: *Markwald v. His Creditors*, 7 Cal. 213; *Blackman v. Pierce*, 23 Id. 503; *O'Neil v. Garrett*, 6 Iowa, 480; *Reynolds v. Boston etc. R. R.*, 43 N. H. 580. And a notice by the vendor, without an express demand to redeliver the goods, is sufficient to charge the carrier. If the carrier is clearly informed that it is the intention

and desire of the vendor to exercise his right of stoppage *in transitu*, the notice is sufficient: *Reynolds v. Boston etc. R. R.*, *supra*; *Litt v. Cowley*, 7 Taunt. 169; *Whitehead v. Anderson*, 9 Mees. & W. 518; *Bell v. Moss*, 5 Whart. 189. And notice to the agent of the carrier, who in the regular course of his agency is in the actual custody of the goods at the time the notice is given, is notice to the carrier: *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 160.

The case made by the record shows that the goods in question were consigned to the care of the defendant at Cisco, to be forwarded by him in the usual course of business to the vendee at Virginia City; that the defendant was engaged in the forwarding business at Sacramento, and had an agent at Cisco, whose business it was to receive all goods shipped to the care of defendant, and deliver them to the order of the vendee upon payment of charges and commissions; that, while the goods were at Cisco, and in the custody of the defendant's agent, who had full charge of the forwarding business at that place, a letter from the plaintiff, addressed to the defendant at Cisco, containing a bill of the goods, and informing the defendant that the vendee had been attached, and that he wanted to save the goods, and directing the defendant not to deliver the goods to any one except his (the plaintiff's) agent at Virginia, who would be looking out for them, was received by the defendant's agent at Cisco; that the defendant, by his agent, acknowledged the receipt of the letter, and stated that the goods were "in store, and he would hold them subject to the order of Byers" (plaintiff's agent); that afterwards the vendee of the goods came to the agent of defendant, and, tendering charges and commissions, demanded the goods, and that the demand was complied with; that the vendee was insolvent at the date of the notice to defendant's agent that the plaintiff desired to stop the goods in his hands.

In view of these facts, and the law as above declared, the defendant is clearly liable for a conversion of the goods.

Judgment and order affirmed.

STOPPAGE IN TRANSITU, WHEN RIGHT OF EXISTS: *Hause v. Judson*, 29 Am. Dec. 384, note; *O'Brien v. Norris*, 77 Id. 284, and note 288; *Chandler v. Fulton*, 60 Id. 188; does not rescind contract of sale: *Newhall v. Vargas*, 33 Id. 617; *Patten's Appeal*, 84 Id. 479.

WHEN TITLE OF VENDOR OF GOODS IS SUPERIOR and will prevail: See *Sturtevant v. Orser*, 82 Am. Dec. 321, and note 328.

DAVIS v. McFARLANE.

[87 CALIFORNIA, 694.]

CONTRACTS FOR SALE OF GROWING PERIODICAL CROPS ARE NOT CONTRACTS for sale of interest in land, within the meaning of the statute of frauds, and need not be in writing, to give them validity. Nor is this rule affected in California by the circumstances, that, by the terms of the contract, the purchaser is to have possession of the land for the purpose of raising the crop, and harvesting it when matured.

GROWING CROP, UNTIL READY FOR HARVEST, CANNOT, by itself, become object of delivery, and can only be delivered into the possession of the vendee, by delivering to him the possession of the land also, of which it is a part. And a chattel thus situated is not regarded as within the meaning of the statute of frauds, of which a sale, in order to be valid, as against the creditors of the vendor, must be accompanied by an immediate delivery and continued change of possession.

THE opinion states the case.

Caleb Dorsey, for the appellant.

Jo Hamilton, and Schell and Hewel, for the respondent.

By Court, SANDERSON, J. The action is for the conversion of three thousand bushels of wheat; and the facts, as found by the court, are substantially as follows:—

In 1868, one Bowen plowed and sowed in wheat about 240 acres of the public lands of the United States. The land was open and uninclosed, and Bowen never had any possession, or right of possession, except such as was conferred by his cultivation in the manner stated. On the 16th of March, 1868, Bowen sold the growing crop, by verbal contract, to the plaintiff, at the price of \$2.25 per acre. By the terms of the contract, the plaintiff was to pay, and did pay, \$20 down, and agreed to pay \$180 more on the 1st of April then next, and the remainder when the crop should be harvested. Bowen was not residing upon the land at the time of the sale, but was residing at a place about fifteen miles distant; and there was at the time no person in the actual and visible possession of the land or crop. After the sale, Bowen never lived upon the premises, nor did he have any agent or servant there, nor did he, at any time thereafter, have any actual or visible possession of the land or crop; but he did not go to the crop and deliver possession at the time of the sale, but said to the plaintiff: "Now, you know what you have bought, and what you will have to do; you will either have to go out there, or keep a man to take care of it." As a part of the contract, the plaintiff was, from the time of the sale, to guard the crop from

cattle at his own risk, and cut and harvest it at his own expense. About ten days after the sale, the plaintiff went out to the premises and examined the crop. He found no person there, and saw no indications that any person was, or had been for a long time, stopping there. The plaintiff remained there two nights and three days, continuously, at that time. On the 1st of April,—the day upon which the remainder of the first payment of two hundred dollars was to be made, according to the terms of the contract,—the amount requisite to complete the payment was tendered by the plaintiff to Bowen, who refused to accept it, saying that he had sold the crop to another person.

The cultivated fields in the vicinity or neighborhood were generally uninclosed, and therefore open to the incursions of cattle, and it was customary to employ some person to herd the cattle and keep them from the crops. In this the owners of the crops united, and contributed the requisite funds. The plaintiff united with other owners of crops, on the 1st of April, and contributed the sum of seventeen dollars as his share for the protection of the crop in question. From that time until the 1st of July the person so employed looked after and protected the crop from the incursions of cattle. The plaintiff, however, frequently visited the premises, for the purpose of looking after and protecting the crop. On the 25th of March, nine days after his sale to the plaintiff, Bowen sold his right to the land and to the crop to the defendant, and gave him a bill of sale. The price was \$818, of which \$50 was paid down. At the time of the sale, the defendant was ignorant of the previous sale to the plaintiff, but learned of it before he had made any further payments upon his purchase. At the time of this second sale, Bowen was not on the premises, but at the store of the defendant, about four miles distant. After the sale, one Tipton, at the request of Bowen, went with the defendant to the premises, and put him in possession, there being no one there at the time. They rode around the place, and returned to their homes. The defendant declined to contribute anything for the protection of the crop, but expressed a willingness to do so if he succeeded in holding the crop. After this there was a continued controversy between plaintiff and defendant until the crop had matured, when the defendant, against the will and protest of the plaintiff, entered and harvested the crop, which yielded three thousand bushels, of the value of three thousand dollars.

Two points are made by the appellant,—1. That the sale to the plaintiff was of an interest in land, within the meaning of the sixth section of the statute of frauds of this state, and therefore void, because not in writing; 2. If the sale was of chattels, there was no immediate delivery, followed by an actual and continued change of possession, within the meaning of the fifteenth section of the statute, and the sale was therefore void, as against the defendant, who is a subsequent purchaser in good faith. Neither point can be sustained.

a. Contracts for the sale of growing periodical crops—*fructus industriales*—are not within the statute of frauds, and therefore need not be made in writing. After some vacillation, this has become the settled doctrine: *Marshall v. Ferguson*, 23 Cal. 65. Nor, as we consider, is the rule affected in this state by the circumstance, if such be the case, that, by the terms of the contract, the purchaser is to have possession of the land for the purpose of raising the crop and harvesting it when matured. Whatever the interest of the purchaser in the land may be under such a contract, it is certain that it does not exceed that of a lessee for a year, which latter interest is excepted from the operation of the statute of frauds of this state. This subject has been considered at length by Mr. Browne in his work upon the statute of frauds, page 238, sections 235 et seq. He reviews most of the leading cases. From the English cases he deduces this rule: "If the contract, when executed, is to convey to the purchaser a mere chattel, though it may be in the *interim* a part of the realty, it is not affected by the statute; but if the contract is, in the *interim*, to confer upon the purchaser 'an exclusive right to the land for a time for the purpose of making a profit of the growing surface,' it is affected by the statute, and must be in writing, although the purchaser is, at the last, to take from the land only a chattel": Sec. 249. This was said of the fourth section of statute 29 Car. II., c. 8, which does not exempt leases for a year and less from its operation: See Appendix to Browne on the Statute of Frauds. In view of the fact that leases for a year and less are excepted from the operation of the statute of frauds of this state, we consider that a contract in this state for the sale of growing crops—the products of periodical cultivation—is not affected by the statute, although it may confer upon the purchaser an exclusive right to the land while the crop is ripening and being harvested.

b. A growing crop, while growing, and until ready for the

harvest, is also unaffected by the fifteenth section of the statute in relation to the sale of goods and chattels in the possession and under the control of the vendor. A growing crop, until ready for the harvest, cannot by itself become the object of a delivery, and can only be delivered into the possession of the vendee by delivering to him the possession of the land also, of which it is a part. We do not consider that chattels thus situated fall within the rule prescribed by the statute in relation to the immediate delivery and actual and continued change of possession of goods and chattels in the possession and under the control of the vendor, at least until nature has prepared them for delivery to the reaper. To so construe the statute would make it an absolute interdiction upon the sale of growing crops, unless the vendor is willing to abandon the possession of his farm to the vendee at the same time. Growing crops, in respect to delivery, are not unlike ships and cargoes at sea, of which delivery cannot be made until they reach port. If delivery of ship and cargo be made within a reasonable time after reaching port, the sale is good as against creditors and subsequent purchasers: *Joy v. Sears*, 9 Pick. 4; *Portland Bank v. Stacey*, 4 Mass. 661 [3 Am. Dec. 253]; *Buffington v. Curtis*, 15 Id. 528 [8 Am. Dec. 115]. Although growing crops are chattels, and, as we have seen, will pass by verbal sale, yet they are not susceptible of manual delivery until harvested; and therefore, until harvested, they are not "in the possession or under the control of the vendor," within the meaning of the statute: *Bours v. Webster*, 6 Cal. 660; *Visher v. Webster*, 13 Id. 58; *Pacheco v. Hunsacker*, 14 Id. 120; *Bernal v. Hovious*, 17 Id. 541. The point has been ruled the same way in Kentucky, in the case of *Robbins v. Oldham*, 1 Duvall, 28. There the sale was of a growing crop of tobacco, the seller to cultivate, harvest, and deliver thereafter. The court held that a change of possession at the time of the sale was not required, and said: "It needs no argument to show that this qualification of the rule is necessary to the ordinary business and commerce of the country, which it is the policy of the law to encourage. And why is the present case not embraced by the qualification? Here was an absolute sale of a growing crop, not susceptible of delivery at the time. The convenience of the seller—or it may be the necessity of his situation—required such disposition of his property. So far as the record shows, the transaction was fair and free from any taint of actual fraud. Is it the policy of the law to inter-

dict such sales entirely by declaring them absolutely fraudulent on the mere ground that the seller retains, as he must necessarily do, the possession of the property until it shall become susceptible of actual delivery? We think not": See also *Whipple v. Foot*, 2 Johns. 418 [3 Am. Dec. 442].

Judgment and order affirmed.

PAROL EVIDENCE IS NOT ADMISSIBLE to prove sale of growing crop of wheat: *McIlwaine v. Harris*, 64 Am. Dec. 196, and see cases collected in note 197. Compare *Backenstoss v. Stahler*, 75 Id. 592; *Harrell v. Miller*, 72 Id. 154, and note 157.

WHETHER GROWING CROPS PASS BY DEED OF LAND, see *Turner v. Cool*, 85 Am. Dec. 449, and note 452; *Kingsley v. Hollbrook*, 86 Id. 173.

PAROL EVIDENCE IS ADMISSIBLE TO PROVE THAT CROP OF CORN GROWING upon land at the time the land was conveyed did not pass by the deed, but was reserved by the grantor. A distinction in this respect is made between *fructus industriales* and fruit upon trees, etc., which are the spontaneous products of the earth, or its permanent fruits: *Flynt v. Conrad*, 93 Am. Dec. 588.

THE PRINCIPAL CASE IS CITED to the point that an unripe growing crop is personal property, not capable of manual delivery, in *Raventas v. Green*, 57 Cal. 255; and is cited to the point that the expression "now growing and standing," employed in a mortgage of oats, should be construed as describing the condition of the cereals when they are nourished and supported by the earth, and not the grain which had been cut and thrashed, in *Ford v. Sutherland*, 2 Mont. 443.

SMITH v. LAWRENCE.

[28 CALIFORNIA, 24.]

PARTY STANDING BY PLEADING NEED NOT RESERVE EXCEPTION TO DECISION sustaining a demurrer thereto, in order to take advantage of the ruling on appeal from the judgment.

PURPOSE OF RESERVING EXCEPTION IS TO MAKE MATTER OF RECORD the decision of the court upon a question of law presented to it, which would not otherwise appear of record.

VALID AGREEMENT NOT TO SUE UPON DEMAND until the happening of a particular event suspends the running of the statute of limitations until such event occurs.

AGREEMENT, FOR VALUABLE CONSIDERATION, TO FORBEAR TO SUE upon demand until the happening of a particular event, is valid, though it be not signed by the debtor, if it does not provide for the performance of any act by him.

COVENANT FOR CONFIRMATION OF MEXICAN TITLE TO LAND is not satisfied by a title to the same land obtained by entry and purchase.

PERSONS WHO WILL NOT BE AFFECTED BY JUDGMENT ARE NOT NECESSARY PARTIES. Thus in an action upon promissory notes, upon which plaintiff agreed, in consideration of the promise of a third person to pay them upon the confirmation of the title of his grantor to certain lands,

to forbear suit until the decision of the question of such title, it was held that neither such third person nor his grantor were necessary parties to the action.

ACTION upon two promissory notes. The complaint, after setting out the notes, alleges that, shortly after the execution thereof, one Parmelee and one Hammitt entered into a contract, whereby Hammitt agreed to pay certain obligations of the defendant, Lawrence, to Smith, the plaintiff, upon the confirmation of Parmelee's title to certain lands in a suit then pending, and which lands he had sold to Hammitt, in consideration of which Smith agreed with Lawrence that he would not sue on the demands against Lawrence until the decision of the question of title to such lands. A demurrer to the complaint was sustained, and plaintiff refusing to amend, judgment was rendered for the defendant.

Whiting and Napthaly, for the appellant.

E. A. Lawrence, respondent, *in pro per*.

By Court, RHODES, J. Judgment having been rendered for the defendant upon demurrer to the complaint, it will be convenient to consider the case upon the points made by the respondent.

1. The first point is, that no exception was taken by the plaintiff to the order sustaining the demurrer. When a party stands by a pleading, to which a demurrer is sustained, no exception to the decision is required. The office of an exception, reserved in the manner provided by the statute, is to cause the question of law, which was presented to and decided by the court, to be made a matter of record, so that it may be re-examined by the court on motion for a new trial, or be reviewed by the appellate court. The action of the court upon a demurrer usually is, and in all cases should be, entered of record; and the making of the same thing a matter of record a second time, by reserving an exception, would subserve no useful purpose. There is no more room to indulge the presumption of an acquiescence in the decision, because no exception was taken, than there would be that the losing party acquiesced in a judgment, because he took no exception to the order for judgment. The only authority cited by the defendant on this point is *Bostwick v. McCorkle*, 22 Cal. 669, in which it is said that it did not appear that the plaintiff excepted to the order sustaining the demurrer to the replication, and that therefore the action of the court could not be

reviewed. No authority is cited by the court in support of that position, and we are unable to see upon what ground it can be sustained. When a demurrer to a pleading is sustained, and the pleading is amended, the amendment operates as an acquiescence in the decision on the demurrer. It surely could not be said that a refusal to amend would also be deemed an acquiescence in the decision. There is no mode in which a party could more distinctly manifest his dissent from the decision than by refusing to amend. An exception is not necessary, unless a bill of exceptions, or a statement, under our system of practice, is requisite, in order to present for review the question of law upon which the decision passed, which the party insists is erroneous; and neither a bill of exceptions nor a statement is required, where the record already presents the question of law and the decision of the court.

2. It is contended that the demurrer was properly sustained because the complaint shows that the statute of limitations had run against the promissory notes. This position is correct, unless the agreement set forth in the complaint had the effect to suspend the running of the statute. One of the notes was dated January 30, 1858, and was payable one day after date; and the other was dated February 18, 1858, and was payable on demand. On the 15th of April, 1858, the plaintiff, in consideration of certain covenants mentioned, and "for other good and valuable considerations," paid by the defendant, agreed in writing with the defendant "that he would forbear to sue upon or demand payment" of the promissory notes until it should be finally determined by the courts of the United States whether the title of the claimants to the Romero Rancho was valid, and entitled to confirmation. It is alleged that, in February, 1864, this title was finally rejected, and decided to be invalid by the supreme court of the United States. No sufficient reason is suggested why the agreement is not valid. It is not necessary, as insisted by the defendant, that he should have signed the agreement in order to render it valid, for the agreement did not provide that any act should be performed by him; but it is enough that it was binding upon the plaintiff. Nor is the allegation as to the failure of Parmelee's title defective, for it is alleged that he claimed solely under the grantees of the Romero Rancho, and that that title was finally rejected. Whether he could have acquired a title from the United

States by entry and purchase is not material, for that is not the title in respect to which the agreement was made; and whether it was so acquired is not a proper subject of investigation, under the demurrer, for the complaint contains no allusion to such title. Accepting the contract as valid and binding upon the plaintiff, it precluded him from suing upon the notes until the happening of the event mentioned in the contract. During that period, his cause of action was suspended; and during the same period, the statute of limitations did not run: Angell on Limitations, sec. 115. The payee of the notes is entitled to the full term of four years in which to commence his action, and the extension of the time for the payment of the notes did not deprive the payee of any portion of that time.

3. Neither Parmelee nor Hammitt is a necessary party to this action. Neither of them will be affected by a judgment upon the promissory notes. The judgment will not prevent them from litigating the question as to the confirmation of the title to the rancho, or as to the validity or performance of their contract.

Judgment reversed, and court directed to overrule the demurrer.

CROCKETT, J., having been of counsel in this cause, did not participate in the decision.

PARTY STANDING BY PLEADING NEED NOT RESERVE EXCEPTION to decision sustaining a demurrer thereto: *Bourafsky v. Powers*, 1 Utah, 334, citing the principal case.

EXCEPTION NEED NOT BE RESERVED TO MATTER WHICH WILL OTHERWISE APPEAR OF RECORD: *New Orleans etc. R. R. Co. v. Albritton*, 75 Am. Dec. 98.

PERSONS WHO HAVE NO INTEREST IN SUBJECT-MATTER, AND WILL NOT BE AFFECTED by judgment, are not necessary parties: See *May v. Smith*, 59 Am. Dec. 594; *Cooley v. Scarlett*, 87 Id. 298.

FALLON v. KEHOE.

[28 CALIFORNIA, 44.]

IF TRUE OWNER CONVEYS PROPERTY BY ANY NAME, the conveyance, as between the grantor and grantee, will transfer the title.

CONVEYANCE OF LAND, EXECUTED BY OWNER IN HIS RIGHTFUL NAME, though such name be different from that in which he acquired it, will, if duly recorded, operate as constructive notice of the sale and transfer of the title, and will take precedence of any subsequently recorded deed to the same land, executed in the name by which it was acquired.

EJECTMENT. The opinion states the facts.

Bodley and Rankin, for the appellant.

Jarboe and Harrison, for the respondents.

By Court, CROCKETT, J. In 1847 the alcalde of San José granted a lot in that town to Darby O'Fallon. This, however, was not the true name of the grantee, whose real name was Jeremiah Fallon, and Darby O'Fallon was only a nickname by which he was generally or often called and known. In January, 1850, whilst still the owner of the lot, Fallon, for a valuable consideration paid to him by one Murray, a brother of the plaintiff, conveyed the lot in fee by his true name, Jeremiah Fallon, to the plaintiff in this action. At the date of this conveyance, the recording act of this state had not taken effect, but was subsequently passed on the 16th of April of that year. After the passage of this act, and before Fallon had made any other conveyance of the property, the deed to the plaintiff was duly recorded. It appears that, subsequently, in May, 1855, the original grantee, Fallon, by a deed executed by him by the name of Darby O'Fallon, for a valuable consideration paid to him by Oliver Teal, conveyed the lot to the latter; that the title of Teal, by proper mesne conveyances, was afterwards vested in one Davis Divine, who, when he took the conveyance, well knew Jeremiah Fallon, and that he signed and executed the deed to Teal, at the request of Divine, as Darby O'Fallon, and not as Jeremiah, and that Divine knew Darby O'Fallon and Jeremiah Fallon to be the same person; that afterwards the defendant, Catharine Kehoe, for a valuable consideration, and in good faith, purchased the premises from Divine, who, in 1857, executed a conveyance to her in due form, under which she immediately entered into, and has ever since remained in, possession; that Divine entered into the possession when he obtained a conveyance of said lot, and continued in possession until his sale and conveyance to Kehoe. Under these facts, the question for our decision is, Which of the two—the plaintiff or defendant—has the title?

The first point for solution is, whether or not the conveyance of Fallon, by his true name, to the plaintiff, was operative in law to convey his title. We apprehend there can be but little doubt on this point, and we not understand counsel as controverting the proposition that, if the true owner conveys the property by any name, the conveyance, as between the grantor and grantee, will transfer the title: *Middleton v. Findla*,

25 Cal. 80. The plaintiff therefore acquired Fallon's title by a sufficient and valid conveyance. The recording act which was subsequently passed required all deeds, whether made before or after the passage of the act, to be recorded, in order to operate as constructive notice to subsequent purchasers.

Section 26 provides that "every conveyance of real estate within this state, hereafter made, which shall not be recorded as provided in this act, shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real estate, or any portion thereof, where his own conveyance shall be first duly recorded."

Section 41 provides that "all conveyances of real estate heretofore made and acknowledged, or proved according to the laws in force at the time of such making and acknowledgment or proof, shall have the same force as evidence, and be recorded in the same manner and with like effect as conveyances executed and acknowledged in pursuance of this act." Section 25 provides that all conveyances certified and recorded as prescribed in the act shall, from the time of filing the same for record, "impart notice to all persons of the contents thereof, and all subsequent purchasers and mortgagees shall be deemed to purchase with notice."

The deed to the plaintiff was duly recorded as required by the act; and if her title is not valid, it must be by reason of her omission to perform some act not required by the statute. She has certainly performed all the conditions demanded by the statute. Having, as we have seen, a valid and operative conveyance which was translativ of the title, she recorded it in due time, in the proper office, before any rights had vested in the defendants or their grantors. What more could she have done to protect her rights? Her conveyance was from the true owner, by his true name, and when recorded it imparted "notice to all persons of the contents thereof, and all subsequent purchasers and mortgagees shall be deemed to purchase with notice." The defendants, therefore, must be deemed to have had notice "of the contents" of this deed. But it is said this did not notify them that Jeremiah Fallon and Darby O'Fallon were the same person; and it is assumed that it was the duty of the plaintiff to put upon the record, in some form, a proper notice of this fact, in order to protect her title against a subsequent purchaser, in good faith, for a valuable consideration. We have been referred to no provision of the statute which imposed this duty upon her. In recording her deed,

she did all that the statute requires, and I am aware of no principle of the common law which made it incumbent on her, in any form, to give notice that her grantor, Jeremiah Fallon, was known by the nickname of Darby O'Fallon, and that the grant was made to him by that name. It would have been better, perhaps, if the statute had contained a provision to the effect that when the owner of land conveys it by a different name from that in which he acquired it, the deed should contain a proper reference to that fact, for the security of subsequent purchasers or encumbrancers. But there is no such requirement in the statute or at common law, and we have no power to exact conditions not found in the law. If land be conveyed to an unmarried woman, who afterward marries and becomes a widow, and then conveys the land by her last name, there can be no doubt that the record of the deed would impart notice to a subsequent purchaser; or if the name of the owner be changed by act of the legislature, and he afterward conveys by his new name, we apprehend there can be no doubt, as the law now stands, that his deed, when recorded, would impart notice. In such cases the subsequent purchaser buys at his peril; and however great the hardship which occasionally ensues (of which this case is, perhaps, an example), the remedy must be provided by the legislature, and not by the courts. The evil is one which admits of a simple remedy. If the statute provided that if land be conveyed by a different name from that in which the grantor acquired it, the record of the deed should not impart notice to subsequent purchasers or encumbrancers, unless it contained proper recitals showing why the deed is made in a different name, the difficulty would be completely remedied.

But, under the law as it now is, the judgment, in our opinion, ought to be reversed, and a new trial had, and it is so ordered.

SPRAGUE, J., gave no opinion.

CONVEYANCE BY OR TO PARTY IN WRONG NAME. — Names are used in a conveyance to distinguish the parties from all other persons in the world. The law recognizes but one christian or baptismal name, and the omission or insertion of, or even mistake in, the middle name in a conveyance is immaterial: *Dunn v. Games*, 1 McLean, 320; *Games v. Stiles*, 14 Pet. 322; *Banks v. Lee*, 73 Ga. 25; and where a party actually owning land and intending to convey it has really executed a deed, it is good, notwithstanding his name in the body of the instrument is written with a different middle name from the one in the signature: *Erskine v. Davis*, 25 Ill. 251.

A person who executes a deed in any name will not be permitted, himself, to take advantage of the fact that such is not his name: Com. Dig., tit. *Fait*, B. 1; Martindale on Conveyancing, 64. In *O'Meara v. N. A. M. Co.*, 2 Nev. 113, the grantor spelled his name differently from the manner in which it was spelled in the body of the deed and in the certificate of acknowledgment. It was held, upon proof of the execution of the deed by him, that he could not deny that it was his deed. This rule, it is said in *Boothroyd v. Engles*, 23 Mich. 19, is not founded upon the theory that the grantor has acquired a new name in fact, but on the theory of estoppel, — that he has so acted in the given case that it would be unjust to permit him to dispute his own act.

Where a deed is executed to a party in a wrong name, it seems that the title will vest, and that the mistake may be proved by parol: *Aultman v. Richardson*, 7 Neb. 1. In *Staak v. Sigelkow*, 12 Wis. 235, the grantee was designated by a wrong baptismal name. The court held that this was susceptible of explanation by parol proof. In *Peabody v. Brown*, 10 Gray, 45, a deed was made to Hiram Gowing. It was held that Hiram G. Gowing might show by parol that the deed was intended to be made to him. The theory in this case, however, was, that middle names not being recognized, and there being therefore two persons of the same name, parol evidence might be resorted to to give effect to the intention of the parties to the deed. A mistake in setting out the name of a corporation will not vitiate the deed, if it is apparent or can be shown what corporation was meant: *Douglas v. British Bank*, 19 Ala. 659; *Culpeper Soc. v. Digges*, 6 Rand. 165; *President etc. v. Myers*, 6 Serg. & R. 12. Where a mortgage was executed to a corporation by a name to which it was contemplated to change the existing name, it was held valid. The court said that in a proceeding upon such a mortgage it should be averred that the mortgage was made to the company by the name used, it being then known by that name, as well as by the name it was legally entitled to: *City Bank v. Kenosha*, 21 Wis. 112. Where land was conveyed to E. A. C., which was the name of E. A. S., the intended grantee, before her marriage, parol evidence was admitted to show that she was the person intended: *Scanlan v. Wright*, 13 Pick. 523.

Where one seeks to prove title as against a third party through a deed executed in a wrong name, it has been held that if the difference in the names consists of a slight variance in the orthography, and that the two names are the same in sound, the deed will be held good, and even admissible in evidence without further proof of the identity of the grantor. And this especially where, in the certificate of acknowledgment, the officer certifies that he knows the persons signing the deed, and that they are the same persons who are described as grantors therein: *Lyon v. Kain*, 36 Ill. 362. And see *Middleton v. Findla*, 25 Cal. 76. In *Boothroyd v. Engles*, 23 Mich. 19, however, the court refused to admit in evidence, upon the acknowledgment alone, a deed containing the name of Hiram Sherman, as grantor, signed by Harmon Sherman, and duly acknowledged by Hiram Sherman. The court said that, in the absence of other proof, the deed was signed by one person and acknowledged by another, and refused to express an opinion as to whether the deed would be admissible in case of proof that the party signing the deed was known by both names. In *Nixon v. Cobleigh*, 52 Ill. 387, the court, though not deciding the question, seems to be of the opinion that such evidence would be admissible.

GURNEE v. MALONEY.

[18 CALIFORNIA, 83.]

PROBATE COURT HAS EXCLUSIVE JURISDICTION TO ADJUST AND ENFORCE DEMANDS for expenses of administration of the estates of decedents, among which are claims for services rendered and money expended, at the request of the administrator, for the benefit of the estate; and an action is not maintainable in the district court, against the administrator, which seeks to charge the estate with such expenses.

ACTION to recover counsel fees and moneys claimed to be due from the estate of Daniel Lyons, deceased. The opinion states the facts.

George A. Nourse, for the appellant.

Moore, Laine, and Silent, for the respondent.

By Court, SAWYER, C. J. This is an action to recover counsel fees and moneys against the estate of Daniel Lyons, deceased, for services alleged to have been rendered and moneys expended for the benefit of the estate, at the urgent request of the former administrator, one Walsh, in the prosecution of certain claims in favor of the estate, in the land-office at San Francisco. The services and advances of moneys, at the request of Walsh, as administrator, are alleged; that Walsh's letters have since been revoked, and the defendant appointed; that property was saved to the estate in consequence of the services and advances made; that Walsh has no funds in his possession, and retained none, wherewith to pay for said services, etc.; that the assets are amply sufficient to pay all the debts of the estate; that Walsh is insolvent; that he has presented his claim to the defendant, as administrator, verified in due form, and that defendant, as administrator, has refused to allow it.

Defendant demurred to the complaint on the grounds, — 1. That the district court has no jurisdiction; and 2. That the complaint does not state facts sufficient to constitute a cause of action against the defendant. The demurrer having been sustained, judgment for defendant was entered thereon, and plaintiff appeals.

Conceding the liability of the estate upon such contracts as are set forth in the complaint, we do not think they constitute claims against the estate, within the meaning of sections 128 to 140, inclusive, of the probate act. The claims therein referred to are such as accrued against the intestate in his lifetime, or resulted directly from contracts made, or acts per-

formed, or wrongfully omitted to be performed, during his lifetime.

The charge now in question, if necessary and proper to preserve the estate, comes under the head of expenses of administration referred to in section 219. The whole estate is in the custody and under the control of the probate court. It has jurisdiction of the whole subject-matter, and it is its exclusive province, subject to appeal to this court, to determine what items of expenditure incurred during the administration under its own supervision, are proper charges against the estate. The constitution and statutes commit these matters to the probate court, except when there arises some special grounds for equitable cognizance to give jurisdiction to the district court. Such seems to be the view entertained by our predecessors in *Deck v. Gherke*, 6 Cal. 669, where, after speaking of the effect of the allowance of claims against the estate, it is said: "This rule applies only to such claims as were debts against the deceased, and not to the expenses incurred or disbursements made by the administrator in his management of the estate, which latter claims are conclusive only after having been allowed by the probate court, upon settlement of the account, after notice to the parties interested." We think this correct. The parties interested in the estate are entitled to be heard upon the propriety of such expenditures; otherwise, the administrator might, through judgments collusively permitted in the district courts, allow the whole estate to be squandered. The heirs and creditors cannot be heard in such actions in the district court. In *Hope v. Jones*, 24 Cal. 93, we held that the district court had no jurisdiction to interfere with the apportionment of commissions between administrators in a suit by an administrator against his co-administrator. If the district court has no jurisdiction to entertain such a suit, we do not see why it should have jurisdiction to intermeddle in any other matter purely of administration.

Walsh may be personally liable on his contract: *Dwinelle v. Henriquez*, 1 Cal. 392; Story on Contracts, 282-287; Addison on Contracts, 382. Had the plaintiff sued Walsh in his individual character, and recovered, Walsh could have presented the amount recovered in his accounts, but it would then devolve on the probate court to determine whether the liability was properly incurred on behalf of the estate, and to what extent it was a proper charge against the estate. The heirs and creditors would be entitled to be heard upon the charge.

The judgment of the district court would not be conclusive upon such hearing, either upon the propriety or extent of the charge.

We think, in such cases, the district court has no jurisdiction to determine the question whether the item is a charge properly incurred in the administration of the estate or not. The cases from our own reports cited by appellant do not appear to us to bear upon the question in hand. The case of *Portis v. Cole*, 11 Tex. 157, seems to favor appellant's view; but unless the constitution and statutes of Texas differ from ours, we are unable to perceive upon what principle it can be sustained. The assumption of jurisdiction by the district court to hear and determine such questions, would, it seems to us, be a direct interference with the administration of an estate actually in progress under the supervision of the probate court.

We think the district court had no jurisdiction, and that the demurrer was properly sustained.

Judgment affirmed.

JURISDICTION OF PROBATE COURTS IS EXCLUSIVE WHEN: See *Linszenbigler v. Gourley*, 94 Am. Dec. 51, and note. In *Bush v. Lindsey*, 44 Cal. 125, it is said that while the principal case holds that probate courts possess general powers, it does not hold that they have jurisdiction of all matters relating to the estates of deceased persons. In *Anguisola v. Arnez*, 51 Id. 430, the principal case is cited to the point that probate courts have exclusive jurisdiction of the accounts of executors and administrators, and of the final distribution of the estates of decedents; and in *Estate of Page*, 57 Id. 241, it is cited to the point, that as part of the expenses incurred in the management of an estate, the compensation of attorneys for services rendered in behalf of the estate is within the exclusive jurisdiction of the probate court. In *Cole v. Superior Court*, 63 Id. 89, also citing the principal case, it is said that an administrator cannot make a binding contract for compensation of an attorney for services to be rendered for the benefit of the estate, but that all arrangements with attorneys are subject to power of the probate court to provide differently.

WAGNER v. HANNA.

[88 CALIFORNIA, 111.]

OWNER OF LAND WHO SELLS HALF OF IT, RESERVING RIGHT OF WAY across it, and in the same deed granting to the vendee a right of way across the unsold half, does not thereby create rights which are annexed or appurtenant to the respective tracts so as to pass with the title.

WHETHER GRANT OF RIGHT OF WAY BE IN GROSS OR APPURTENANT to some other estate must be determined from the grant itself, and not by matter *aliunde*.

RIGHT OF WAY IS EASEMENT, only when it appears in the grant to be made for the benefit of a dominant tenement which is described therein.

RIGHT OF WAY IS INTEREST IN LAND WITHIN STATUTE OF FRAUDS, and hence transferable only by an instrument in writing, which describes the interest conveyed. It it be appurtenant, the instrument must so describe it, and must include a description of the tract of land to which it is annexed.

ACTION for damages for obstructing plaintiff's right of way across defendant's lands. The opinion states the facts.

Thomas H. Hanson, and S. F. and L. Reynolds, for the appellant.

Bradley Hall, for the respondent.

By Court, RHODES, J. In the first count of the complaint, it is alleged that Wolfe, who was the owner of a certain tract of land, conveyed the easterly portion thereof to Carter; that, in and by the deed of conveyance, Wolfe "reserved to himself the privilege, free use, and right of way through the premises conveyed by said last-mentioned deed, and described therein, to the *embarcadero* on said Santa Margarita Creek, which right of way, reserved as aforesaid, thereby became, and was and is, appurtenant to the remaining portion of the premises hereinbefore described, and the premises so conveyed by said Wolfe to said Carter thereby became, and was and is, subject to the said right of way." There is no other allegation in that count showing or more fully stating the origin of the right of way over the land conveyed to Carter. The defendant succeeded to Carter's title, and the plaintiff is the owner of the westerly portion of the tract of land. It is claimed by the plaintiff that the reservation of the right of way over the easterly portion of the tract—the land conveyed to Carter—created an easement which became appurtenant to the westerly portion of the tract,—the land retained by Wolfe,—and that the easement passed with the land under the deed of conveyance of Wolfe to the plaintiff. On the other side, it is contended that the right of way was only a right in gross, which was personal to Wolfe, and therefore not transferable.

An easement may be created by grant, or it may be acquired by prescription. The grant may be either express or implied. A reservation of an easement in the deed by which the lands are conveyed is equivalent, for the purpose of the creation of the easement, to an express grant of the easement by the grantee of the lands. There is nothing in the first

count going to show a grant of the easement by implication; and the question is, whether the terms of the deed, as therein alleged, show an express grant. The only allegation of a grant is that already quoted, — that Wolfe “reserved to himself the privilege, free use, and right of way through the premises conveyed” to the *embarcadero*. The averments following this — that thereby the right of way so reserved became appurtenant to the premises reserved by Wolfe, and that thereby the premises conveyed to Carter became subject to said right of way — are not the averment of facts, but of conclusions of law.

To the creation of a right of way that amounts to an easement, and not merely to a right of way in gross, two tenements are necessary, — the dominant, to which the right of way belongs, and the servient, upon which the obligation rests: Washburn on Easements, 3; *Wolf v. Frost*, 4 Sand. Ch. 72. The principal distinction between a right of way in gross and an easement is found in the fact that in the first there is, and in the second there is not, a dominant tenement. The right of way is in gross, and personal to the grantee, because it is not appurtenant to other premises. The owner of premises may grant the right of way in either form, and if it is the intention to grant a right of way in gross, there is no mention of dominant premises. If the grant is of an easement, it is always made for the benefit of other premises, and the premises to which the way becomes appurtenant are described in the grant. There is nothing in the reservation in the deed mentioned in the complaint which points to a dominant tenement.

Though a right of way may be granted in gross, this is never presumed when it can fairly be presumed to be appurtenant to some other estate. But this question is to be determined by a construction of the grant: Washburn on Easements, 28. The fact appearing *aliunde* the grant, that the grantee owned an estate, would not tend to show that the way was granted for the benefit of such estate. Had the grantee owned several distinct parcels of land, it would not be contended that the way was appurtenant to each of them. But there is no better reason why it should be appurtenant to one parcel, when the grantee owned only the one parcel, than to each parcel, when he owned several parcels, if in neither case it appears from the grant that the right of way was created for the benefit of any particular estate.

A further objection is found in the statute of frauds to construing the right of way as appurtenant to the land of the plaintiff. A right of way is an interest in land, and can be conveyed only by an instrument in writing. The writing must describe the interest conveyed. If it is appurtenant to another tract of land, it must be so described in the conveyance; for that fact could not be added to the instrument by parol evidence without violating the statutory rule. It is of the very substance of an express grant that the way be granted for the benefit of a particular estate, and the description of such estate—the dominant estate—is as essential as that of the servient estate.

But if the averment that the "right of way reserved as aforesaid thereby became, and was and is, appurtenant to the remaining portion of the premises hereinbefore described," is not a mere legal conclusion, as we hold, but an averment that the way was in fact appurtenant, then that averment was sufficiently denied in the answer, and the plaintiff was not entitled to judgment on the pleadings. The deed upon which the plaintiff relies is not before us.

Judgment reversed, and cause remanded for a new trial.

CROCKETT, J., dissenting. I do not concur in the conclusions at which my associates have arrived in this case. A deed reserving or creating an easement or right of way is to be construed like any other deed or instrument, according to the intention of the parties to it. When the intention appears from the face of the instrument, viewed in the light of the surrounding circumstances, effect will be given to it accordingly. If it appears from the deed thus construed that it was intended to reserve only a personal right to pass over the land, this is what is termed a right of way in gross, and is neither assignable or appurtenant to any other land. On the other hand, if it appears that it was intended to create a permanent right of way for the benefit of an adjoining or contiguous tract, by whomsoever owned or enjoyed, then it is an easement in a legal sense, which becomes appurtenant to such other tract, and passes with the title to all subsequent holders of it. The question for solution in this case is, whether the deed from Wolfe to Carter reserved to the former only a right of way in gross, which was personal, and not assignable, or whether it created an easement which became appurtenant to the remaining portion of the tract not sold and conveyed by Wolfe to

Carter. The facts are, that Wolfe, being the owner of a tract of land, sold and conveyed the eastern half of it to Carter, and in the deed granted and conveyed also to Carter a right of way through the western half to the Petaluma road, and in the same deed reserves to himself "the privilege, free use, and right of way," through the premises conveyed to Carter, to the *embarcadero* on Santa Margarita Creek. Was this right of way — mutually secured to the parties — intended by them to be only a personal right, not transferable? or was it designed to be permanent and annexed to the respective tracts by whomsoever they might thereafter be held and enjoyed? I cannot resist the conclusion that the latter is the true construction of the deed.

The two tracts are sufficiently described, and each becomes the dominant tract in respect to the right of way secured across the other. If either had stood alone and unconnected with the other, it might well have been deemed a mere personal privilege not appurtenant to the land. But when the owner of a tract of land sells and conveys one half of it, reserving a right of way across it, and in the same deed grants to his vendee a right of way across the other half, it appears to me to be obvious that these were privileges intended to be annexed to the respective tracts, and to become appurtenant to them, and, of course, to pass with the title.

In my opinion, the judgment ought to be affirmed.

RIGHT OF WAY IS APPENDANT WHEN: See *Alley v. Carlton*, 94 Am. Dec. 260, and cases cited in note.

SPLIVALLO v. PATTEN.

[88 CALIFORNIA, 128.]

FAILURE IN WHOLE OR IN PART OF CONSIDERATION FOR PROMISSORY NOTE, after a *bona fide* assignment before maturity, is not available as a defense in an action by the assignee against the maker, though the assignee had, at the time of the assignment, full knowledge of the consideration for which the note was given.

ACTION upon a promissory note. The opinion states the facts.

Whiting and Naphtaly, for the appellants.

Campbell, Fox, and Campbell, for the respondents.

By Court, SPRAGUE, J. Whether or not the facts stated in the answer would have constituted a valid defense to any portion of the plaintiff's demand, had the plaintiff been the payee instead of the assignee of the note, is not necessary now to determine. It is very evident that a simple failure of consideration, in whole or in part, after a *bona fide* assignment thereof before maturity, will not avail the makers as a defense in a suit by the assignee of a promissory note, even though the assignee had full knowledge of the original consideration for which the note was given prior to his purchase and receiving the transfer of such note: Story on Promissory Notes, sec. 191.

From the complaint it appears that the defendants, on the first day of May, 1866, made their joint promissory note for \$725, payable to David Mahoney, or order, four months from date, and delivered the same to Mahoney, who thereupon, on the same day, for a valuable consideration, indorsed and delivered the same to plaintiff, who thereupon became and still is the owner and holder thereof. The answer does not deny or question the *bona fides* of the transfer of the note by Mahoney to plaintiff, but in substance alleges as a defense that the original consideration for the note was the rent for one year from May 1, 1866, of certain lands of which Mahoney claimed to be the owner, and of which defendant, Patten, was in possession; that after Patten had occupied said lands as the tenant of Mahoney about four months of such term, the title of Mahoney to the lands failed, and defendant acquired the title thereto from the government of the United States, by reason of which a partial failure of the original consideration for the note resulted, to the extent of about two thirds thereof; and that plaintiff, at the time he took the assignment of the note, had full notice of the consideration for which it was made and delivered to Mahoney, etc. To this answer plaintiff demurred, upon the ground that the same did not state facts sufficient to constitute a defense to the action. The demurrer was sustained by the court, with leave to defendants to amend their answer, which being declined, the case was submitted to the court upon the complaint and evidence of plaintiff, and judgment rendered against defendants for the full amount of the note, with costs, in gold coin.

The demurrer was properly sustained, and we discover no error in the record.

Judgment affirmed.

CROCKETT, J., having been of counsel, did not participate in this decision.

FAILURE OF CONSIDERATION FOR PROMISSORY NOTE IS DEFENSE WHEN:
See *Peterson v. Johnson*, 94 Am. Dec. 581, and cases cited in note.

PEOPLE v. KELLY.

[38 CALIFORNIA, 145.]

STATE COURTS HAVE NO JURISDICTION TO PUNISH CRIMES against the laws of the United States as such.

PERJURY COMMITTED BY SWEARING FALSELY BEFORE REGISTER of the United States land-office, in a proceeding touching the public land, is an offense against the laws of the United States solely, and is not punishable in the state courts.

INDICTMENT for perjury. The opinion states the facts.

W. L. Dudley, for the appellant.

Jo Hamilton, attorney-general, for the respondents.

By Court, SAWYER, C. J. The defendant was indicted for the crime of perjury, committed by swearing falsely as to settlement, residence, and cultivation, before the register of the United States land-office, in the Stockton land district, in the matter of his application to make proof of settlement and cultivation of a tract of land, a part of the public domain of the United States. A demurrer to the indictment was interposed, on the ground, among others, that the state court had no jurisdiction of the offense, because it was not committed in any court or tribunal of the state, nor against the state, but against the United States, and that it is only cognizable in the federal courts. The demurrer was overruled; and upon a subsequent trial, a conviction had.

The fifth section of the act of Congress of 1857, entitled "An act in addition to an act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," provides as follows: "And be it further enacted, that in all cases where any oath, affirmation, or affidavit shall be made or taken before any register or receiver, or either or both of them, of any local land-office in the United States, or any territory thereof, or where any oath, affirmation, or affidavit shall be made or taken before any person authorized by the laws of any state or territory of the

United States to administer oaths or affirmations, or take affidavits, and such oaths, affirmations, or affidavits are made, used, or filed in any of said local land-offices, or in the general land-office, as well in cases arising under any or either of the orders, regulations, or instructions concerning any of the public lands of the United States, issued by the commissioner of the general land-office or other proper officer of the government of the United States as under the laws of the United States, in anywise relating to or affecting any right, claim, or title, or any contest therefor, to any of the public lands of the United States, and any person or persons shall, taking such oath, affirmation, or affidavit, knowingly, willfully, or corruptly swear or affirm falsely, the same shall be deemed and taken to be perjury, and the person or persons guilty thereof shall, upon conviction, be liable to the punishment prescribed for that offense by the laws of the United States."

The eighty-second section of our own state criminal code, under which the defendant was indicted, reads as follows: "Every person, having taken a lawful oath or made affirmation in any judicial proceeding, or in any other matter where by law an oath or affirmation is required, who shall swear or affirm willfully, corruptly, and falsely in a matter material to the issue or point in question, or shall suborn any other person to swear or affirm as aforesaid, shall be deemed guilty of perjury or subornation of perjury (as the case may be), and upon conviction thereof shall be punished by imprisonment in the state prison for any term not less than one nor more than fourteen years."

There can be no doubt that the acts charged constitute an offense against the laws of the United States, under the section of the statute quoted, but it is not so clear that it is embraced within the terms of our own statute. The "judicial proceeding" or "other matter where by law an oath or affirmation is required" may well refer to judicial proceedings and oaths required by the laws of the state only. It is not so clear that it was designed to extend to any other. The state tribunals have no power to punish crimes against the laws of the United States as such. The same act may, in some instances, be an offense against the laws of both, and it is only as an offense against the state laws that it can be punished by the state in any event. That the offense charged is not cognizable in the state courts, the case of *State v. Adams*, 4 Blackf. 147, and *State v. Pike*, 15 N. H. 83, are authorities

directly in point. The first is entirely similar to the present case, the affidavit constituting the offense being with reference to the settlement of the defendant on the public lands. In the second case the perjury charged was committed in a proceeding under the national bankrupt act. The court distinguishes it from the class of cases like *Fox v. State of Ohio*, 5 How. 410, *Moore v. Illinois*, 14 Id. 14, and *People v. White*, 34 Cal. 183. On this point, in *State v. Pike*, *supra*, the court says: "Happily for us, however, we are of opinion that the classes of crime we have thus referred to, although there is some analogy between them and the case before us, do not necessarily govern this case. There is a distinction which we think is conclusive, whatever may be the true principle applicable to them. In those cases the acts done and charged as violations of the laws of both governments are not done in the course of the administration of the laws of either government; but the matters from which the charge now before us arises are alleged to have occurred under and in the course of the execution of the laws of the United States. Those laws required certain things to be done. Congress had the right to prescribe how they should be done, to regulate the duties of all persons who acted under the law, and to prescribe penalties for the violation of such duties. In such case, if acts are done which, if transacted under the laws of this state, would have constituted offenses under the provisions of our criminal code, yet being done in pursuance of the laws of another government (having the sole power to regulate the whole proceeding) authorizing the act to be done, prescribing the mode, imposing the duty, and affixing the penalty for the violation of it, the acts cannot be regarded as having been done under the sanction of the laws of this state so as to subject the parties to punishment under those laws. Mr. Justice Story says exclusive jurisdiction is uniformly attendant upon exclusive legislation: *United States v. Cornell*, 2 Mason, 91. See also the opinion of Mr. Justice McLean, *United States v. Bailey*, 9 Pet. 261.

This distinction seems to be properly taken. It follows that the demurrer should have been sustained.

Judgment reversed.

SANDERSON, J., expressed no opinion.

ALTHOF v. CONHEIM.

[28 CALIFORNIA, 280.]

WIFE IS NOT PROPER PARTY TO ACTION FOR RECOVERY OF MONEY loaned to her to pay for lot of ground, the deed to which was executed to her, but which became common property, and the purchase of which was ratified by the husband.

HUSBAND RATIFIES ACT OF WIFE IN BORROWING MONEY to purchase lot of ground by using and occupying the ground, and by selling a portion of it, and applying the proceeds to his own use; and he is responsible for the repayment of the money so borrowed.

PRESUMPTION IS, THAT ALL PROPERTY ACQUIRED DURING MARRIAGE is common property, unless the contrary is shown.

PRAYER OF COMPLAINT IS NOT DEMURRABLE.

ACTION for money loaned. Defendants demurred on the ground that the complaint did not state a cause of action, and for improper joinder of the wife as a party. The demurrers were sustained, and plaintiff declining to amend, judgment was rendered for defendants. The further facts appear in the opinion.

P. G. Buchan, for the appellant.

Smith and Rosenbaum, for the respondents.

By Court, CROCKETT, J. The only point on this appeal is, whether or not the demurrer to the complaint was properly sustained. It appears from the complaint that the defendants are husband and wife; that the wife resided in San Francisco, and carried on business in her own name, whilst the husband resided in another state; that the wife, desiring to purchase a lot in Oakland, borrowed of the plaintiff \$520 in gold coin to enable her to make the purchase, and which was actually paid as part of the purchase-money; that she took the deed in her own name; that the husband afterwards arrived in this state, and he and his wife took possession of the lot, and have resided on it as their home; that they have since sold a portion of the lot, and yet retain the balance of it; that for the portion so sold they received a sum nearly equal to the original purchase-money for the whole, and greatly exceeding the amount loaned by the plaintiff; that the husband and wife united in the sale and conveyance, and in the receipt of the purchase-money, and are now in the joint use and enjoyment of it. The prayer is for a judgment against both, for the amount loaned, with interest, and that it be declared a lien on that portion of the lot which remains unsold.

It is evident there can be no personal judgment against the wife: *Maclay v. Lova*, 25 Cal. 367 [85 Am. Dec. 133]; *Smith v. Greer*, 31 Id. 477; *Brown v. Orr*, 29 Id. 120.

The complaint does not aver that the purchase-money paid by the wife, exclusive of the \$520 loaned by the plaintiff, was of her separate estate; and in the absence of such an averment, the presumption is, it was common property. On acquiring the title to the lot, therefore, it became the common property of the husband and wife, and was subject to the disposition of the husband alone. The wife, therefore, was not a proper party to the action, and her demurrer was properly sustained.

But the demurrer of the husband ought to have been overruled. If the wife had no previous authority from the husband to contract the debt to the plaintiff, he adopted and ratified the transaction by using and occupying the lot, selling a portion of it, and appropriating the proceeds to his own use. Whilst dealing with the property as his own, which was in part paid for with the plaintiff's money, borrowed by the wife for that purpose, the law will presume either that the wife had authority to contract the loan, or that the husband has since ratified the transaction and agreed to be bound by it. He will not be allowed to say that he ratifies so much of it as inures to his advantage, by accepting the benefit of a purchase made by his wife partly with the plaintiff's money, but repudiates so much of it as requires the sum advanced by the plaintiff to be refunded. He must take the transaction *cum onere*, if he adopts it at all. In ratifying the purchase by his wife, he ratifies her engagement to the plaintiff as well, and in adopting one he adopts the other. He also demurs specifically to so much of the complaint as prays that the amount due to the plaintiff be decreed to be a lien on the lot, and for a judgment in gold coin. But it is well settled in this court that the prayer of a complaint is not the subject of demurrer: *Rollins v. Forbes*, 10 Cal. 299; *People v. Morrill*, 26 Id. 336.

Judgment reversed as to the defendant Max Conheim, with an order to the district court to overrule his demurrer to the complaint, and allow him to answer on the usual terms. Judgment affirmed as to the defendant Elise Conheim, and the entire costs of this appeal to be paid by the defendant, Max Conheim.

SPRAGUE, J., dissented.

WIFE IS IMPROPERLY JOINED WITH HUSBAND WHERE NO PERSONAL JUDGMENT can be had against her: See *Maclay v. Love*, 85 Am. Dec. 133, and note.

PROPERTY ACQUIRED DURING MARRIAGE IS PRESUMED TO BELONG TO COMMUNITY, unless contrary is shown: See the extended note to *Cooks v. Bremond*, 86 Am. Dec. 628 et seq., and the citation of the principal case in *Schuler v. Savings and Loan Society*, 64 Cal. 396.

THE PRINCIPAL CASE IS CITED in *Morse v. Swan*, 2 Mont. 309, to the point that a party is entitled to any relief to which the facts set forth in his pleadings show him to be entitled, no matter what relief he may ask.

MARTIN v. ZELLERBACH.

[38 CALIFORNIA, 300.]

CONSTRUCTION OF SECTION 13 OF CALIFORNIA CORPORATION ACT OF 1853.

— The prohibition in the thirteenth section of the California corporation act of 1853 against the declaration of dividends, except from the surplus profits, and against the division or withdrawal of capital, is directed against the trustees, and is designed to protect creditors as such, and to protect the stockholders against mismanagement in distributing capital stock in the form of dividends.

SALE BY CORPORATION OF ALL ITS PROPERTY TO ANOTHER CORPORATION, to be paid for in stock of the latter, which stock is to be distributed among the stockholders of the former, or any other arrangement which will have the effect to withdraw the capital of an incorporated company and turn it over to the stockholders, except in the manner provided by law, is in violation of that provision of the thirteenth section of the California corporation act of 1853, which forbids the trustees "to divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company," and is void as to any creditor of the corporation, either prior or subsequent, who had no notice of the arrangement at the time of giving the credit.

BY TERM "CAPITAL STOCK," AS USED IN PROHIBITION of section 13 of the California corporation act against dividing or distributing the capital stock, the statute intends the capital of the corporation on which it transacts its business, whether such capital consists of money, property, or other valuable commodities.

COURT OF EQUITY WILL NOT LEND ITS AID TO ENFORCE PERFORMANCE of an act which the law prohibits to be done.

TRANSACTION WHICH IS VOID BECAUSE PROHIBITED BY LAW cannot be purged of its infirmity by means of an estoppel.

DOCTRINE OF ESTOPPEL IN PALS PROCEEDS WHOLLY ON THEORY that the party to be estopped has, by his declarations and conduct, misled another to his prejudice, so that it would be a fraud upon him to allow the true state of facts to be proved.

IN ORDER THAT DECLARATIONS OR CONDUCT OF PARTIES SHALL OPERATE AS ESTOPPEL, in respect to title to real property, it must appear, — 1. That the party making the admissions, by his declarations or conduct, was apprised of the true state of his own title; 2. That he made the admission with the express intention to deceive, or with such careless or culpable negligence as to amount to constructive fraud; 3. That the

other party was not only destitute of all knowledge of the true state of the title, but of all convenient or ready means of acquiring such knowledge by the use of ordinary diligence; and 4. That he relied directly upon such admission, and will be injured by allowing its truth to be disproved.

JUDGMENT CREDITOR IS NOT ESTOPPED TO DENY DEBTOR'S TITLE to property sold under execution in satisfaction of his judgment.

WHERE CASE INVOLVING QUESTIONS BOTH OF LAW AND OF EQUITY is tried without a jury, the more regular and orderly practice is to first dispose of the equitable branch of the case.

RECORD IN CASE INVOLVING QUESTIONS BOTH OF LAW AND OF EQUITY which is tried without a jury should show that the equitable issues were first disposed of, if that course was followed; or if the whole action and all the issues were tried and submitted together, that fact should appear.

WHETHER APPEAL LIES FROM JUDGMENT DETERMINING QUESTION of an equitable nature alone, and leaving the issues of law wholly undisposed of, *quere*.

ACTION by judgment creditor of corporation to recover possession of certain property which formerly belonged to the corporation and was conveyed by the stockholders to another corporation. The opinion states the facts.

A. C. Peachy, S. Heydenfeldt, D. F. Barstow, Edmond L. Goold, and J. I. Caldwell, for the appellant.

J. P. Hoge, A. C. Niles, and D. Belden, for the respondents.

By Court, **CROCKETT, J.** There are certain prominent facts in this case, which are established by the findings, and which, as we understand it, are not controverted by the parties. These facts are:—

1. That there were two corporations, to wit, the Eureka Lake Company, and the Miners' Ditch Company, which were duly organized under the general incorporation laws of this state for the purpose of supplying water for mining purposes, each of which corporations owned, in severalty, several water ditches, and the two corporations having no interests in common, but the stockholders, officers, and managers of both corporations were to a great extent the same persons.

2. That after some discussion in respect to a consolidation of the two corporations, there was a meeting of the stockholders of the Eureka Lake Company, in the spring of 1859, at which meeting all the stock was represented, and the proposition was fully discussed for uniting the two corporations, and it was finally determined unanimously by the stockholders that they would so unite upon the following basis, to

wit, that the property of the two corporations should be thrown together, and managed in common, and should be owned in the proportion of two shares to the Miners' Ditch Company and three shares to the Eureka Lake Company; and the president of the Eureka Lake Company was authorized by the stockholders to make this offer to the Miners' Ditch Company.

3. That in May, 1859, at a meeting of the stockholders of the Miners' Ditch Company, at which all the stock was represented, the proposition of the Eureka Lake Company was formally made and accepted by a formal vote of the stockholders of the Miners' Ditch Company, every vote being in favor of it, except the vote on a few shares, held by one Crandall.

4. That, in accordance with this agreement, the two companies commenced to act together and as one body on the 20th of June, 1859, and from that time until the fall of 1860 the property of both corporations was managed by common agents, who had full possession and control of the whole, and the business was conducted in the name of the Eureka Lake and Miners' Ditch Company; that during this period large sums of money were expended in improving the common property,—over thirty-five thousand dollars being expended on the ditches of the Eureka Lake Company; that this arrangement was apparently only temporary, the intention being to effect finally a complete and legal union of the property and business of the two corporations; that accordingly, in September, 1860, a meeting of the stockholders of the Eureka Lake Company was regularly called for the purpose of acting on a proposal to create a new corporation, to be composed of the members of the two old ones, to which the property of both should be conveyed, at which meeting it was determined that such new corporation should be organized, and that the Eureka Lake Company would convey to it all its ditches and other property, upon the consideration that the Miners' Ditch Company would do the same, and that stock in the new corporation would be credited to the stockholders of the two companies in the proportion agreed upon. Similar action having been taken by the stockholders of the Miners' Ditch Company about the same time, in the following month (October, 1860), in accordance with these arrangements, a new corporation, called the Eureka Lake Water Company, was duly organized by the stockholders of the other two com-

panies; and on the 29th of that month, the Miners' Ditch Company, by a regular deed, conveyed all its property to the new corporation. But about this time, the members of the Eureka Lake Company were informed by counsel that their incorporation had never been perfected; that there was no such corporation as the Eureka Lake Company in legal existence, and that the only way they could convey their property was by a deed signed by each member of the company in his individual capacity; and in accordance with this advice, such a deed, signed by the individual stockholders of the Eureka Lake Company, was executed October 25, 1860, conveying, or purporting to convey, all the property of the Eureka Lake Company to the Eureka Lake Water Company, and, at the same time, full possession of all the property was given to the Eureka Lake Water Company; from which time to January, 1863, said company had complete possession and control of the property, claiming it as its own, and no one interfering with or disputing its title or possession. But no deed of conveyance was ever given by the Eureka Lake Company as a corporation to the Eureka Lake Water Company; and in January, 1863, the last-named company, for the purposes hereinafter mentioned, gave possession to the defendants, Zellerbach and Powers, who have ever since remained in possession.

5. That immediately after the formation of the Eureka Lake Water Company, stock books were opened, and stock of that company issued to all the stockholders of the other two companies, in the proportion agreed upon.

6. That, after receiving possession, the Eureka Lake Water Company expended large sums in improving the property, and in discharging liens upon it, before then contracted by the Eureka Lake Company.

7. That the Eureka Lake Water Company borrowed of the defendants, Zellerbach and Powers, two hundred thousand dollars, at least ninety thousand dollars of which was used in paying off liens of the Eureka Lake Company, contracted before the Eureka Lake Water Company was organized; to secure which sum the last-named company gave to the defendants a mortgage upon all the property; in which mortgage it was provided that the defendants might receive and apply the profits and income of the property towards the satisfaction of the mortgage debt; and in order the more fully to carry this provision into effect, the Eureka Lake Water Company, on the

3d of January, 1863, delivered to the defendants the full possession and control of the property, and they have since retained it under this agreement.

8. That on the 2d of February, 1863, the plaintiff brought suit against the Eureka Lake Company to recover money due from said company, and had the property in contest attached; that on the 19th of February, 1863, the plaintiff duly recovered a judgment in said action against said company for \$9,469, and costs; that on the 7th of September, 1863, an execution under said judgment was duly issued and levied upon the premises in controversy, as the property of the Eureka Lake Company, being the same property conveyed by the stockholders of the Eureka Lake Company to the Eureka Lake Water Company. And such proceedings were had that, upon the 20th of October, 1863, the said premises were duly and regularly sold by the sheriff, under said execution, to the plaintiff, for eleven thousand dollars, and no redemption from said sale having been made within the time allowed by law, the sheriff, on the 25th of April, 1864, executed and delivered a deed to the plaintiff, in due form, for said premises, conveying to him all the interest, right, and title of said Eureka Lake Company in and to said premises; that all said proceedings were regular, and the plaintiff thereby acquired all the title and interest which the Eureka Lake Company had in and to said premises at the time the attachment was levied; that the said judgment was founded on promissory notes of the Eureka Lake Company to the plaintiff, which were made in the summer and fall of 1861, and that said sheriff's deed was duly recorded in April, 1864.

9. That before the recovery of the judgment aforesaid against the Eureka Lake Company, the plaintiff recovered a judgment against the Eureka Lake Water Company, on a money demand, and caused an execution thereon to be levied upon the premises conveyed by the stockholders of the Eureka Lake Company to the Eureka Lake Water Company, and upon a large amount of other ditch property, including the entire property claimed by the Eureka Lake Water Company, and embracing the Poorman's Ditch, Grizzly Ditch, and others, and caused all said property to be sold under said execution, at which sale the defendants were the purchasers, and now holds the sheriff's deed therefor.

The foregoing are the main facts included in the findings, and, we believe, are not controverted. But the findings are

not very explicit as to the date at which the debt accrued on which the plaintiff's judgment against the Eureka Lake Company was founded. As we understand the finding on this point, it merely states that the promissory notes on which the judgment was based were made in the summer and fall of 1861, but is silent in respect to the fact whether the indebtedness of which the notes were the evidence accrued at the times the notes were executed and delivered, or existed before.

On these facts, the plaintiff brought his action against the defendants, to recover the possession of the property which formerly belonged to the Eureka Lake Company, and which was conveyed by the stockholders of that company to the Eureka Lake Water Company. The answer sets up substantially the foregoing facts as an equitable defense; and on the hearing, the district court entered judgment for the defendants, denying the plaintiff's prayer for relief, and adjudging that the plaintiff be forever estopped, enjoined, and restrained from setting up title to said premises, as against the defendants, derived from said Eureka Lake Company subsequent to the twenty-ninth day of October, 1860, at which date the defendants entered into the possession of said premises. The plaintiff made a motion for a new trial, which was denied, and he has appealed as well from the judgment as from the order denying said motion.

On the rehearing, the cause has been more elaborately argued than on the former hearing; and the able briefs with which we have been furnished by eminent counsel have presented in a forcible manner the arguments tending to elucidate the important questions at issue.

It is maintained with much earnestness, on behalf of the plaintiff, that if the agreement between the Eureka Lake Company and the Miners' Ditch Company, for the consolidation of the two companies on the terms proposed, had been carried out in the most formal manner and into complete execution by proper and formal deeds of conveyance duly executed by the two corporations, transferring the property to the new corporation styled the Eureka Lake Water Company, and if there had been a complete and formal delivery of the possession, at the same time to the last-named company, the transaction would have been wholly void as against the plaintiff, for the following reasons: 1. Because it would have violated the thirteenth section of the act of 1853, under which the Eureka Lake Company was incorporated, and which is as follows:

"It shall not be lawful for the trustees to make any dividend, except from the surplus profits arising from the business of the corporation; nor to divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company; nor to reduce the capital stock, unless in the manner prescribed in this act; and in case of any violation of the provisions of this section, the trustees under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large on the minutes of the board of trustees at the time, or were not present when the same did happen, shall, in their individual and private capacities, be jointly and severally liable to the corporation and the creditors thereof, in the event of its dissolution, to the full amount so divided, withdrawn, paid out, or reduced; provided, that this section shall not be construed to prevent a division and distribution of the capital stock of the company, which shall remain after payment of all its debts, upon the dissolution of the corporation or the expiration of its charter": Stats. 1853, p. 89.

2. That the proposed arrangement, if not void because in contravention of the foregoing statute, was void on the ground that in substance it proposed to establish a partnership between the two corporations, and that the law forbids such partnerships between corporations.

We propose to examine these propositions before proceeding to other branches of the case. In considering the first proposition, the first point to be determined is, whether or not the arrangement proposed and attempted to be carried into effect between the two companies was in violation of the statute we have quoted. We entertain no doubt that it was, upon the facts as now presented in the answer and found in accordance therewith by the court.

The policy which dictated that provision is obvious. Persons dealing with corporations do so upon the faith that its property and all its assets, of whatsoever nature, are vested in trustees or managers, to be held by them as a fund which shall be primarily liable for its debts. For although the stockholders, and in some events the trustees, may be individually liable to creditors, it is the property and capital of the corporation to which creditors chiefly look, and which give it credit in the community. To protect the rights of creditors, and to guard against improvident or fraudulent conduct on the part of trustees and stockholders, the legislature has wisely

provided, in the section we have quoted, that the capital stock of the company shall remain intact, and shall not be devoted to the stockholders, either in the shape of dividends, payments, or withdrawal, nor by way of a reduction of the capital stock (unless in the manner provided by law), except on a dissolution of the corporation in the method prescribed by law, nor even then until "after the payment of all its debts." Dividends can only be declared from "the surplus profits arising from the business of the corporation," and it shall not be lawful "to divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company," except after payment of all its debts, on a dissolution of the corporation. This language leaves no room for construction or doubtful interpretation. It is direct, explicit, and unmistakable. But it was not intended to interfere with the plenary power of the trustees over the legitimate business of the corporation. They may manage, control, and alienate its property in the regular course of its business, but they cannot devote the proceeds, beyond the surplus profits, to the stockholders, either directly or indirectly, until after all its debts are paid.

The transaction, as agreed upon and attempted to be carried out, between the Eureka Lake Company and the Miners' Ditch Company, if effectual in law, would, of necessity, have resulted in an alienation of the entire property and capital of the Eureka Lake Company to the Eureka Lake Water Company. This is undeniable. Not one dollar of its property or capital would have remained to satisfy the demands of creditors, unless the proceeds of the transaction were to be thus applied. But by the terms of the contract the only consideration to be paid was stock in the new company. Was this to be paid, or was it in fact paid, to the trustees of the Eureka Lake Company, to be held by them as a fund for creditors, and as representing the property conveyed to the Eureka Lake Water Company?

On the contrary, the contract was, that this stock was to be issued, and it was afterward issued directly to the stockholders of the Eureka Lake Company. It does not vary the principle that the consideration to be paid was stock instead of money. If the contract had been, that on the transfer of the property the Eureka Lake Water Company would pay to the stockholders of the Eureka Lake Company one hundred thousand dollars in cash as the price of the property, the legal

proposition involved would have been precisely the same as in this case. In either case, the consideration would have been paid, not to the trustees as a fund primarily liable to creditors, but to the stockholders, for their own use. The result of such a transaction would necessarily be, as it has been in this case, that the corporation would be divested of its entire property forming its capital stock, whilst the whole proceeds of it had gone into the pockets of its stockholders, leaving no fund for the payment of debts. If this be not a violation of that provision of the statute which forbids the trustees "to divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company," we are unable to conceive a case which would.

We regret that the learned counsel for the defendants have not discussed this point more fully in their briefs, but we understand their proposition to be, that the statute refers only to the "capital stock of the company," and not to its property. They maintain that the property of a corporation does not necessarily, nor even presumptively, compose a part of its capital stock. We do not so interpret the statute. On the contrary, we think that when the statute speaks, in section 13, of "capital stock," and forbids its withdrawal by or payment to the stockholders, it intends the capital of the corporation on which it transacts business, whether such capital consist of money, property, or other valuable commodities. In no other sense could the term "capital stock of the company," as employed in section 13, have any significance.

But assuming that the transaction in question was in violation of this provision of the statute, it remains to be considered whether it was therefore absolutely void as against the plaintiff, and whether it affords a sufficient basis for the equitable defense set up by the defendants.

It may be stated as a general proposition, that an act which the law prohibits to be done is in so far infirm that a court of equity will not lend its aid to enforce its performance. It is not necessary for us to decide whether it is absolutely void under all circumstances, and as against all persons. But it is clear that a court of equity will not lend itself to enforce the performance of an act which is positively prohibited by law. That would be not to enforce the law, but to annul it.

In this case, the defendants admit that the plaintiff holds the legal title, but claim that they have superior equities, which entitle them to demand that the plaintiff should be re-

strained and enjoined from molesting them in the enjoyment of the property.

The foundation of the alleged equity is the agreement between the two original companies to consolidate, and which was attempted to be carried into effect by the deed from the stockholders before mentioned. If that agreement and deed be stricken from the case, the basis of the defendants' equity is gone. It is upon these that they rely to show that their possession is rightful and meritorious, and that they have an equitable title to the property. But as we have shown, the agreement, being prohibited by law, cannot be enforced in equity. It may be said, however, that this is not an action for specific performance, and the defendants only pray that the plaintiff be enjoined from molesting them in the possession. This is true. There could be no decree for specific performance in this action, because the proper parties are not before the court for relief in that form. But it is also true that, in order to adjudge that the defendants are entitled to the relief which they demand, the court must first decide that the agreement to consolidate was a lawful and valid agreement which the two corporations were competent in law to make. We have seen that this could not be done; and it follows, as a necessary sequence, that the defendants have failed to establish the equitable title on which they rely. We cite in support of these propositions: *Story on Contracts*, secs. 613, 614; *Belding v. Pitkin*, 2 Caines, 147; *Hunt v. Knickerbacker*, 5 Johns. 326; *Wheeler v. Russell*, 17 Mass. 257; 1 *Parsons on Contracts*, 381; *Chitty on Contracts*, 695.

This view of the case renders it unnecessary to discuss the proposition whether or not the agreement between the two companies to consolidate was in effect the creation of a partnership between them; for even if that be its effect, and if it be conceded that it is competent for corporations to unite their business and capital, and thus establish a partnership between them, it is evident, for the reasons before stated, that they cannot do this on such terms and conditions as will have the effect to withdraw the capital and turn it over to the stockholders. It is, therefore, immaterial whether or not the proposed arrangement was in effect the creation of a partnership. In that form, it would have been contrary to law, and therefore incapable of being enforced in equity, for the reasons already stated.

Nor is it material whether or not contracts for the transfer

of such property are required to be in writing. If it be conceded that such property could be transferred by a parol contract, accompanied with a delivery of the possession, it would not aid the defendants. Whether by parol or in writing, the contract could not be upheld in a court of equity, because it is in violation of the statute, as already shown. This inherent vice would vitiate it, whether it be evidenced by writing or not.

This view of the case disposes of the question of ratification by the trustees of the Eureka Lake Company of the acts of its stockholders. If the act was contrary to law, it was incapable of ratification. No amount of ratification by the trustees could give vitality to an act prohibited by law; and we have discussed the question of the validity of the contract without reference to the fact whether or not it was executed or approved by the trustees in their corporate capacity. It is not capable of enforcement in a court of equity as against the plaintiff, by whomsoever it was executed or ratified.

It remains to be considered whether or not the plaintiff stands in such relation either to the property or to the defendants as that he is estopped from questioning the title of the defendants. The defendants insist upon the estoppel on two grounds, to wit: 1. That the plaintiff's debt against the Eureka Lake Company, on which his judgment was founded, did not accrue until after the property had been transferred and the possession delivered to the Eureka Lake Water Company; and that the plaintiff, not being a creditor at the date of the the transaction, and the Eureka Lake Company and its stockholders being content with it, whether it was strictly valid or not, the plaintiff is estopped from questioning its validity; 2. That the plaintiff having caused the property in contest to be sold and conveyed to the defendants under his judgment against the Eureka Lake Water Company, he is thereby estopped from setting up a prior adverse title, or the title which he afterward acquired by means of the sheriff's deed.

In deciding the first point, we do not deem it necessary to inquire whether the plaintiff's debt accrued before or after the attempted execution of the agreement between the two companies. If the agreement was contrary to law, as we hold it to be, it cannot be enforced in equity against any creditor, either prior or subsequent, without notice of the transfer at the time of giving the credit of the corporation. As to all

creditors of the company, prior or subsequent, it was simply void; and no reason has been suggested why a creditor who has in no way promoted the void act should be estopped from contesting it.

But it is claimed that the plaintiff, by the sheriff's deed, acquired only such title as the Eureka Lake Company had, and is only substituted to the rights of that company as they existed when the plaintiff's attachment was levied; and that the said company was at that date estopped by its previous conduct from asserting title as against the Eureka Lake Water Company and the defendants holding under it. Hence it is insisted that the plaintiff is estopped, because his grantor, the Eureka Lake Company, was estopped before his title accrued. But to give effect to an estoppel under these circumstances would be to validate, by way of estoppel, a title which was unlawful in itself, as against a creditor, and which, as against him, could not be made valid by a direct conveyance. If the Eureka Lake Company had not the lawful right, by a direct conveyance, as against its creditors, to convey the title to the Eureka Lake Water Company, under the facts averred in the answer and found, can it be possible that a transaction imbued with this fatal infirmity as against creditors can be purged of its infirmity by means of an estoppel? If so, the title by estoppel would be of superior power to a title founded on a direct conveyance from the party estopped. This is not sound law, and would pervert the whole theory of estoppel.

If it be conceded that the Eureka Lake Company and its stockholders were estopped, it does not follow that a creditor of said corporation is also estopped. The arrangement between the Eureka Lake Company and the Miners' Ditch Company, as the facts are alleged in the complaint and found, we have seen, was unlawful and invalid as to creditors. The defendants, Zellerbach and Powers, seek to establish an equity as against the creditors, by which he shall be estopped from setting up a regular legal title. They claim, not by a title apparently regular, but by a deed manifestly, on its face, from strangers to the legal title. They claim also through a transaction apparently at least unlawful. They allege a state of facts showing an unlawful transaction, without setting out any other facts that could render it lawful, and without showing a want of notice of its true character at the time their interest was acquired. If Zellerbach and Powers advanced their money with a knowledge of all the facts of an irregular and

unlawful transaction, no equity can arise out of it as against a creditor of the corporation who has acquired the title by proceedings in all respects regular. As the defendants claim through a deed from strangers to the legal title, and through proceedings in other respects irregular and unlawful, it devolves upon them to affirmatively allege and prove other facts, if any there be, that render the proceeding regular, or facts showing that they acted in view of circumstances upon which they were entitled to rely, without notice of other facts tending to invalidate their title. This they have failed to do, and there is, consequently, no matter of estoppel disclosed by the record upon which they can rely.

On the second point, we have had some difficulty. The plaintiff caused his execution against the Eureka Lake Water Company to be levied upon the premises in contest as the property of that company; and at the execution sale the defendants purchased, and have obtained the sheriff's deed. Subsequently, the plaintiff levied his execution against the Eureka Lake Company, on the same property, as the property of the last-named company, and having purchased it at the execution sale, has obtained the sheriff's deed. Is he estopped from denying the title acquired by the defendants at the first execution sale?

The question may be solved by a few illustrations. If the same creditor hold separate demands against the mortgagor and mortgagee of a lot of land, and after obtaining judgment against the mortgagor sells his equity of redemption to a stranger, under an execution on the judgment, and if he afterwards obtains a judgment on his separate demand against the mortgagee, and under an execution on that judgment sells the title of the mortgagee and purchases it himself, is he estopped to deny the title of the purchaser at the first sale?

Or, if a creditor, holding separate demands against lessor and lessee, sells the title of the one, under his judgment, and afterwards purchases himself the title of the other, under a judgment against him, is he estopped to deny the title of the first purchaser? It is plain he would not be estopped in either case. The reason is obvious. An execution creditor has the right to sell any pretended title or claim of the judgment debtor to any property whatsoever. If it turns out that he had no title, nothing passes by the sale; but the levy of an execution is not of itself a warranty, nor even an asser-

tion, that the judgment debtor has any valid title to the premises.

If the judgment debtor has but a naked possession, or if he assert only a baseless claim to the property, the creditor has the right to subject it to his execution, without thereby committing himself to the purchaser, in the least degree, as to the nature or validity of the title to be sold. The mere act of causing property to be sold, under his execution, by the judgment creditor, is, at most, but equivalent to a declaration that the judgment debtor has, or claims to have, some kind of title to or interest in the property, but is not an averment that, in point of fact, he has any title whatsoever. Much less can it be held to be an averment that he has a valid title. The doctrine of estoppel *in pais* proceeds wholly on the theory that the party to be estopped has, by his declarations or conduct, misled another to his prejudice, so that it would be a fraud upon him to allow the true state of the facts to be proved. Can it be said with truth that a judgment creditor, by the mere fact of causing whatever title or pretense of title the judgment debtor had to be sold under execution, has deluded the purchaser into the belief that the debtor had a valid title? The law will not presume the purchaser to be so deluded.

The authorities cited by defendants' counsel on this proposition do not contravene this reasoning. In *Dezell v. Odell*, 3 Hill, 215 [38 Am. Dec. 628], a constable had seized personal property under execution, and delivered it to Dezell, as a receiptor, for safe-keeping, taking a receipt for it, wherein Dezell agreed to redeliver the property to the constable on a specified day. On demand by the constable for the property, Dezell refused to deliver it, alleging, for the first time, title in himself.

In an action by the constable to recover the property, the court held that, having received the property from the constable without then asserting title to it, and having promised to redeliver it, Dezell was estopped from setting up his title in that action, but must first restore the possession, and might afterwards litigate his title. The court puts its ruling on the ground that Dezell "had fraudulently deprived the creditor of possession, through the officer, baffled him in his search for other property and in the use of all means for collecting his debt, drawn him by equivocal conduct into the expense of an action, and at the trial claims the whole as constituting a legal defense." Under these circumstances, the court held him to be estopped. But in an able dissenting opinion, Judge

Bronson, we think, very clearly demonstrates that the ruling in that case was erroneous. But conceding it to be sound law, it fails to support the theory contended for in the case we are considering. The other authorities cited only establish the proposition that a party standing by when property is offered for sale, and failing to notify purchasers of his title, or encouraging purchasers to buy it as the property of another, will be estopped from asserting his title.

But without advertent to other authorities, it is sufficient for us to say on this point that the doctrine of estoppel *in pais* has been so often discussed in this court that the general principles which control it must be deemed to be definitively settled. When invoked, in respect to the title, to constitute an estoppel, it must appear, — 1. That the party making the admission, by his declaration or conduct, was apprised of the true state of his own title; 2. That he made the admission with the express intention to deceive, or with such careless or culpable negligence as to amount to constructive fraud; 3. That the other party was not only destitute of all knowledge of the true state of the title, but of all convenient or ready means of acquiring such knowledge by the use of ordinary diligence; and 4. That he relied directly upon such admissions, and will be injured by allowing its truth to be disproved: *Boggs v. Merced Mining Co.*, 14 Cal. 279; *McCracken v. San Francisco*, 16 Id. 626; *Davis v. Davis*, 26 Id. 41 [85 Am. Dec. 157]; *Bowman v. Cudworth*, 31 Id. 153.

Tested by this rule, the plaintiff is not estopped from asserting his title. All that he is alleged to have done by way of estoppel was to cause the property to be sold under his judgment against the Eureka Lake Water Company, at which sale the defendants purchased. It is not proved that he made any declarations, as to the title, either intended or calculated to mislead the defendants; nor that the defendants were in any way influenced to buy by anything that the plaintiff said or did in respect to the title; nor does it appear that they did not know the true state of the title when they bought. In short, the transaction lacks all the material elements of an estoppel.

This case rests for its solution on wholly different principles from those involved in the case of *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543 [*ante*, p. 300]. In that case the Miners' Ditch Company had conveyed its title to the Eureka Lake Water Company by a regular and formal deed, under the seal of the corporation, and had delivered full possession under the deed.

The Eureka Lake Water Company, whilst in possession, mortgaged the property to Zellerbach and Powers, who were strangers to the original transaction, and delivered the possession to them as mortgagees. Whilst in possession as mortgagees, Zellerbach and Powers acquired the equity of redemption of the Eureka Lake Water Company, and thereby obtained a complete legal title. The action was brought by the Miners' Ditch Company to recover the property which it had itself conveyed to the Eureka Lake Water Company, on the ground, — 1. That its conveyance was *ultra vires*, and therefore void; 2. That it was void, because in contravention of the thirteenth section of the act of 1853, already quoted.

Zellerbach and Powers were strangers to the transactions between these three companies, and acquired the title without notice of the proceedings between them. Under these facts, we held, — 1. That the conveyance to the Eureka Lake Water Company was not *ultra vires*; and 2. That the Miners' Ditch Company, the grantor in the deed, which was regular on its face, could not avail itself of the illegality of the consideration to disturb the possession of subsequent purchasers who were strangers to the transaction, and had acquired the legal title in good faith, for a valuable consideration, without notice.

But in the case we are now considering, the facts are very different: 1. The defendants have not acquired the title which remained in the Eureka Lake Company until it was conveyed to the plaintiff; and 2. It is not the Eureka Lake Company which seeks to avoid its contract, and to set aside a formal deed of conveyance, as in the case of the Miners' Ditch Company; but it is a creditor who has himself acquired the title, and insists that the transaction between the three companies was illegal and void as to him. Nor can the defendants in this case invoke the protection of a court of equity on the ground that they are innocent purchasers for value without notice; because, — 1. They have never acquired the legal title; and 2. Their alleged equity is founded on transactions between the Eureka Lake Company and the Eureka Lake Water Company, which were illegal, and prohibited by law, and which a court of equity will not enforce under the facts found in this case, particularly against a creditor who has acquired the legal title.

We wish it to be expressly understood that our decision is limited to the precise facts as disclosed by the record. That it may not be regarded as covering broader grounds than

intended, we deem it proper here to say that we express no opinion upon the question whether property of the kind in question may be transferred by parol and the delivery of possession, or whether, if there are two rival corporations like the Eureka Lake Company and the Miners' Ditch Company, organized for the same purpose of supplying water to a mining region where the demand is limited, which, in consequence of the greater expense of managing the two separately and the competition, are both doing business at a loss, and are liable to become insolvent, it would not be lawful, in pursuance of their interests, to form a new corporation for the same purpose, and convey the property of both to such new corporation in the manner pursued in this instance, provided the new corporation, as part of the arrangement, should assume and become obligated to pay all the debts of the old corporation. Such an arrangement might be for the interest of all parties,—creditors as well as stockholders,—and if lawful, would be valid as to all. The personal liability of the stockholders in such case would continue, and no property would be withdrawn from liability to the creditors' demands. The prohibition of the thirteenth section of the act concerning corporations is directed against the trustees, and seems designed to protect creditors as such, and also to protect the stockholders against their mismanagement in distributing capital stock in the form of dividends, with a view of holding out the idea that the corporation is more prosperous than it is, for the purpose of promoting some unlawful object. If all parties interested are secured from injury, and the purpose is a lawful one, the object of the provision would seem to be accomplished, and there would be no one entitled to complain. Such a transaction was regarded as lawful in *Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 393 [66 Am. Dec. 490]. But we do not intend to express any opinion on these grave questions now, for no sufficient facts are presented in the pleadings or findings to require it; and we only allude to the questions in order to guard our opinion in so important a case from misconstruction or misapprehension.

Judgment reversed, and cause remanded for a new trial.

RHODES, J., expressed no opinion.

CROCKETT, J. (upon a rehearing). On a rehearing which was granted in this cause, by consent of counsel, it was ably and elaborately argued by the respective counsel, both orally

and in printed briefs; but after a careful consideration of the arguments, and a re-examination of the important and interesting questions involved in the case, we see no reason to change or modify the views expressed in the last opinion of the court.

It is urged with much earnestness by counsel for the appellant that we should order a final judgment for the plaintiff to be entered on the findings, and that the case should not be remanded for a new trial. The argument is, that there is no dispute about the facts, all of which are set forth in the findings, and that the only error of the district court was in its conclusions of law from the facts found. Hence it is said there is no need for a new trial, which would only entail upon the parties a useless and vexatious expense and delay without accomplishing any useful result. On the other hand, the counsel for the defendants insists that the only trial had in the court below was on the equity side of the court, and was confined to the issues raised by the equitable defenses set up in the answer, and that, if these be all finally decided against the defendants, they are, nevertheless, entitled to a trial of the issues raised in the action at law.

The action was tried before the court without a jury, and the more regular and orderly practice in such cases clearly is, first, to dispose of the equitable defenses set up in the answer. If these are found for the defendant, it will obviate, in most cases, the necessity of trying the law side of the action. But if found against the defendant, he still has the right to be heard on his other defenses. When a jury is waived, and the whole case is tried before the court, it is often difficult to ascertain from the record whether the trial was confined to the equitable defenses alone, or included all the issues in the cause. A loose practice has prevailed in this respect, which ought to be corrected, and which sometimes leads to the most perplexing difficulties. It should distinctly appear from the record that the equitable defenses were first tried and disposed of; or, if the whole action, and all the issues were tried and submitted together, that fact should appear, so that when the case comes into this court we shall not be left in doubt whether the whole action, or only the equity branch of it, was tried and decided in the court below. This loose practice appears to have prevailed in this case. The complaint avers that the plaintiff is the owner and entitled to the possession of the premises in contest, and that the defendants wrongfully withhold the pos-

session. The answer,—1. Denies the title of the plaintiff, and his right to the possession; 2. Avers generally that the defendants are the owners in fee, and entitled to the possession; and 3. Sets up certain equitable defenses, and prays “that before the trial of this action this court would determine and declare that the plaintiff, Joseph Martin, is estopped from setting up in this action any title to said property derived from the Eureka Lake Company subsequent to the date of the organization of the Eureka Lake Water Company, and the possession by it of said property; and that said plaintiff be enjoined and restrained from setting up such title in this action,” and for general relief.

In the natural order of business, it was the duty of the court, first, to try and decide upon this equitable defense before proceeding with the action at law. If it sustained the defendants’ equities, as it did, it would only enjoin the plaintiff from setting up title under the Eureka Lake Company, acquired after the date specified in the answer, leaving untouched any other title the plaintiff might be able to show. This is all the court attempted to do in its judgment, which was “that said plaintiff, Joseph Martin, be forever estopped, enjoined, and restrained from asserting or setting up, as against the defendants Zellerbach and Powers, any title to the premises described in the complaint, derived from the Eureka Lake Company subsequent to the possession of said premises by the Eureka Lake Water Company; i. e., subsequent to the twenty-ninth day of October, 1860, and that he be enjoined and restrained from setting up said title in this action,” and that defendants recover their costs. The judgment is silent as to any other title the plaintiff may have. It does not attempt to adjudge that the plaintiff has no valid title, or is not entitled to the possession, but only enjoins him from asserting a particular title. There was nothing in the judgment to hinder the plaintiff from proceeding at once with a trial of the action at law, and relying on any other title he might have, except that which he was enjoined from asserting. In order to ascertain what was tried and decided, we can look only to the judgment, for nothing can be said to be tried, in a legal sense, unless it was decided,—and the judgment itself is the only evidence of what was decided. This judgment does not purport to decide upon the plaintiff’s or defendants’ title or right to the possession, but only enjoins the plaintiff from asserting a particular title, without undertaking to adjudicate upon the general title

or right of possession, as between the plaintiff and defendants. Under this state of the record, if the point had been raised on the trial of the appeal, there may have been room for a grave doubt whether there was such a final judgment as authorized an appeal. But as this point has not been raised, we express no opinion upon it. It is quite evident, however, that in dealing with such a judgment, it would be altogether irregular for this court to order the court below to enter a final judgment, in advance of any adjudication by that court, of all the issues raised by the pleadings.

The last opinion delivered by this court in the cause will stand as the opinion and judgment of the court, and it is ordered that the *remittitur* issue forthwith.

SANDERSON, J., expressed no opinion upon the rehearing.

SALE OR TRANSFER BY CORPORATION OF ALL ITS PROPERTY: See a full discussion of this topic in the note to *Miners' Ditch Co. v. Zellerbach*, *ante*, p. 300.

"CAPITAL STOCK" OF CORPORATION, WITHIN MEANING OF CALIFORNIA ACT OF 1853, includes the capital on which it transacts its business, whether money, property, or other valuable commodities: *San Francisco v. Spring Valley Water Works*, 63 Cal. 531, citing the principal case.

CONSTRUCTION OF SECTION 13 OF CALIFORNIA CORPORATION ACT OF 1853. — The rule stated in the first *syllabus* was approved in *San Francisco etc. R. R. Co. v. Bee*, 48 Cal. 404, citing the principal case.

ESTOPPEL IN PAIS, WHEN ARISES: See *Franklin v. Merida*, 95 Am. Dec. 129, and note. The principal case is cited as stating the proper rule as to estoppels *in pais*, in *Reid v. State*, 74 Ind. 262.

COURTS WILL NOT ENFORCE PERFORMANCE OF CONTRACTS WHICH ARE CONTRARY TO LAW: See *Tatum v. Kelley*, 94 Am. Dec. 717, and note.

QUESTIONS CONSIDERED ON APPEAL FROM JUDGMENT IN CAUSE TRIED WITHOUT JURY: See *Thges v. Moak*, 90 Am. Dec. 73.

MILES v. THORNE.

[38 CALIFORNIA, 226.]

UPON DEMURRER ON GROUND THAT ACTION IS BARRED by statute of limitations, if the complaint fails to show whether the contract sued on was verbal or in writing, it will be presumed to be in writing for all the purposes of the demurrer.

UPON APPEAL, ALL PRESUMPTIONS ARE IN FAVOR OF JUDGMENT. If, therefore, a demurrer, on the ground that the action is barred by the statute of limitations, has been sustained, and the transcript fails to show when the action was commenced, it will be presumed that it was not commenced until after the statute had run.

AS BETWEEN CESTUI QUE TRUST AND TRUSTEE OF EXPRESS TRUST, the statute of limitations does not run so long as the trust continues.

EXPRESS TRUST. — Where, by agreement, two parties obtained a road franchise in the name of one upon a bill drawn by the other, and each of them constructed one half of the road, and the one in whose name the franchise stood took possession and collected the tolls on their mutual account, on the understanding that they were to share equally therein, it was held that an express trust was created, of which the party in possession was the trustee.

AGREEMENT, FOR CONSIDERATION, TO DRAUGHT BILL FOR FRANCHISE in favor of another, and to place it in the hands of some member of the legislature, to be introduced in that body, but containing no promise to work for its passage either secretly or openly, is not *contra bonos mores*.

CONTRACT WHEREBY ONE AGREES FOR HIRE TO WORK FOR PASSAGE OF BILLS BY LEGISLATURE is not void as against public policy, provided he does not conceal his interest in the matter, but lets it be known and understood by the members whose judgment he undertakes to influence.

ACTION to obtain conveyance, and for account of profits, etc. The opinion states the facts.

E. L. B. Brooks, for the appellant.

Clarke and Carpentier, for the respondent.

By Court, SANDERSON, J. This is an action to obtain a conveyance of an undivided half-interest in a road franchise, and an account and division of the tolls, all of which as charged have been collected and received by the defendant.

It appears by the complaint that, in 1854-55, the defendant, without any grant from the legislature, had opened and constructed a road or highway situated in the counties of Contra Costa and Alameda, and known as "Thorne's road"; that at the commencement of the year 1862, the road was out of repair and unfit for traveling, and the defendant was destitute of means to repair it; that the defendant was minded to obtain for himself, and such other persons as he might associate with him, a grant from the legislature authorizing him and them to reconstruct and repair the road, and to collect tolls thereon; that he represented his inability to reconstruct and repair the road without assistance, if such grant should be obtained, to the plaintiff, and requested him to assist in the reconstruction and repair of said road in the event a franchise should be obtained from the legislature; that thereupon, in the month of January, 1862, an agreement was made between them, to the effect that the plaintiff should prepare a bill providing for a grant of the franchise to the defendant and such other persons as he might associate with him, and present it

to some member of the legislature, to be by him introduced before a branch of that body, to the end that it might be acted upon and passed into a law; that if said bill passed, the plaintiff should reconstruct that portion of the road which was situated in Alameda County, and the defendant should reconstruct that portion of the road which was situated in Contra Costa County, and each should thereupon become equally interested in the franchise, and share equally in the fruits thereof; that the plaintiff thereupon caused a bill to be drawn and presented to the legislature, which became a grant of the franchise in question,—on the 14th of April, 1862,—under the following title: "An act to authorize Hiram Thorne and others to reconstruct and make a wagon road in the counties of Contra Costa and Alameda" (Stats. 1862, p. 40); that after the making of said grant, they again renewed their agreement in relation to the reconstruction of the road and their equal interests therein; that thereupon the plaintiff, at his own cost, reconstructed that portion of the road which was situated in Alameda County, and the defendant did the same as to that portion which was situated in Contra Costa County; that the road was completed and a toll-gate erected in the latter part of the year 1862, and the rates of toll established by the board of supervisors of Contra Costa County, in accordance with the conditions of the franchise; that thereupon, by mutual consent and on mutual account, the defendant took charge of the road, and has remained in charge from that time to the present, collecting and receiving the tolls, without accounting with the plaintiff; that on the 15th of November, 1866, the plaintiff demanded an account and settlement, and a conveyance of a half-interest in the franchise, both of which were refused by the defendant.

To this complaint the defendant demurred upon the grounds: 1. Because the cause of action is barred by sections 17 and 19 of the statute of limitations; 2. Because the contract was *contra bonos mores*, and therefore void.

The court below sustained the demurrer upon the first ground.

We find nothing in the complaint which shows whether the contract was verbal or in writing. For the purposes of the demurrer, it must be assumed, therefore, that the contract was in writing, and hence the defendant cannot rely upon the clause of the seventeenth section of the statute of limitations in relation to actions upon verbal contracts. The clause of the seventeenth section in relation to actions upon written con-

tracts, or the nineteenth section, which relates to actions for relief not previously provided for, are the only provisions of the statute upon which the defendant can rely.

The record, with which we have been furnished, fails to show when the action was commenced. The complaint was amended, and the amended complaint only has been brought up. That was filed on the 6th of March, 1867. There is neither memorandum, certificate, nor stipulation showing when the original complaint was filed. All presumptions are in favor of the judgment below, and we must, therefore, presume that the action was not commenced until after the expiration of four years from the time at which, under the contract, the plaintiff became entitled to a conveyance. If the fact be otherwise, the appellant should have caused it to so appear upon the record.

The argument of the plaintiff is, that, by reason of the contract between them, the defendant took the franchise, as to an equal and undivided half, in trust for him, and entered into its possession and enjoyment as his trustee, and that the statute could not, therefore, run against his right of action for a conveyance until the defendant had repudiated the trust and claimed to hold adversely, with notice to him; and that, so far as the complaint shows, the defendant did not repudiate the trust until the 15th of November, 1866, and hence the statute commenced to run from that date, and not from the point of time at which, under the terms of the contract, he was entitled to a conveyance.

Whether this view be sound depends upon the character of the trust. The doctrine contended for undoubtedly applies to the case of a direct or express trust. In such a case, the statute does not run, as between *cestui que trust* and trustee, so long as the trust continues,—the reason being that the possession of the trustee is the possession of his beneficiary, and hence his possession is not adverse to the equitable title of the latter, but consistent with it; the possession of the trustee of an express trust being of the same legal complexion as that of a lessee of land, in whose favor the statute does not run so long as his relation as tenant continues. In relation to certain classes of resulting or implied trusts, the rule is otherwise: Angell on Limitations, c. 35. But the operation of the statute upon resulting or implied trusts is not involved in this case, and we therefore express no opinion upon that branch of the general subject.

The complaint shows that there was an express agreement

from the outset that the plaintiff and the defendant should be equal owners of the franchise, when it should be obtained and the road should be reconstructed, and that after the franchise was obtained and the road reconstructed, this agreement was renewed, and it was further expressly agreed that the defendant should enter into possession of the road, and hold the same, and collect the tolls for himself and the plaintiff. By this agreement the defendant expressly declared himself to be the trustee of the plaintiff in respect to his interest in the franchise and tolls; or in other words, he became the trustee of an express trust, as to which the statute of limitations would not begin to run until he should, to the knowledge of the plaintiff, disavow and repudiate the trust, which he did not do, so far as appears upon the face of the complaint, until the 15th of November, 1866, at which time the plaintiff demanded a deed and an account of the tolls.

Whether the trust is within the statute of frauds, and therefore void, unless in writing, is a question which cannot be made upon this demurrer; for, as already suggested, it does not appear upon the face of the complaint that the agreement was not in writing. Upon that question, therefore, we express no opinion.

We find nothing in the contract, as alleged in the complaint, which sustains the point made by the defendant, that it is against public policy, and therefore illegal and void. The point is founded upon the idea that by the agreement the plaintiff was to use his influence to obtain from the legislature a grant of the franchise in question. The complaint furnishes no ground for such a charge. The plaintiff was to draught a bill for the franchise and place it in the hands of some member of the legislature, to be by him introduced to that body; but there was no promise or undertaking on his part to labor, either secretly or openly, with the members of the legislature to secure its passage. Yet, having by virtue of the agreement, an equal interest with the defendant in obtaining the franchise, he had a legal right, equally with him, to urge its passage by all honorable means, provided he did not conceal, but openly acknowledged, his interest in the measure. Even had he agreed to act as the advocate of the defendant, the agreement would not have been illegal, if it was understood that he was to act openly as such, and did so act when the time came. The rule upon this subject has been declared by the supreme court of the United States to be as follows:

"All persons whose interest may, in any way, be affected by any public or private act of the legislature, have an undoubted right to urge their claims and arguments either in person or by counsel professing to act for them before legislative committees, as well as in courts of justice. But where persons act as counsel or agents, or in any representative capacity, it is due to those before whom they plead or solicit that they should honestly appear in their true characters, so that their arguments and representations, openly and candidly made, may receive their just weight and consideration. A hired advocate or agent, assuming to act in a different character, is practicing deceit on the legislature. Advice or information flowing from the unbiased judgment of disinterested persons will naturally be received with more confidence, and less scrupulously examined, than where the recommendations are known to be the result of pecuniary interest, or the arguments prompted and pressed by a hope of a large contingent reward, and the agent 'stimulated to active partisanship by the strong lure of high profit.' Any attempts to deceive persons intrusted with the high functions of legislation, by secret combinations, or to create or bring into operation undue influences of any kind, have all the injurious effects of a direct fraud on the public": *Marshall v. Baltimore and Ohio R. R. Co.*, 16 How. 334. Subjected to this test, we find nothing in the agreement between the plaintiff and defendant, as declared on, which is in any respect inconsistent with the soundest public policy.

Judgment reversed, and the defendant allowed to answer within twenty days after the notice of the filing of the *remititur* in the court below.

RHODES, J., expressed no opinion.

AGREEMENTS TO INFLUENCE LEGISLATION, WHEN VOID: See *Powers v. Skinner*, 80 Am. Dec. 677, and note citing other cases.

STATUTE OF LIMITATIONS AS BETWEEN TRUSTOR AND TRUSTEE. — It is well settled that as between trustee and *cestui que trust*, the statute of limitations does not operate in case of express or direct trusts, so long as they continue: Angell on Limitations, secs. 166, 468; Wood on Limitations, sec. 200; *Boteler v. Allington*, 3 Atk. 459; *Bridgman v. Gill*, 24 Beav. 302; *Cholmondeley v. Clinton*, 2 Jacob & W. 1; *Wedderburn v. Wedderburn*, 4 Mylne & C. 41; *Attorney-General v. Fishmonger's Co.*, 5 Id. 16; *Boone v. Chiles*, 10 Pet. 177; *Prevost v. Grats*, 6 Wheat. 481; *Grats v. Prevost*, Id.; *Oliver v. Piatt*, 3 How. 333; *Phillippi v. Phillippi*, 115 U. S. 151; *Hayman v. Keally*, 3 Cranch C. C. 325; *Piatt v. Oliver*, 2 McLean, 267; *Baker v. Whiting*, 3 Sum. 486; *Mauray v. Mason*, 8 Port. 211; *Wood v. Wood*, 3 Ala. 756; *Hastie v. Aiken*, 67 Id. 313;

Bonner v. Young, 68 Ala. 35; *McCarthy v. McCarthy*, 74 Id. 546; *Hearst v. Pujol*, 44 Cal. 235; *Jones v. Throckmorton*, 57 Id. 368; *Wilmerding v. Russ*, 33 Conn. 167; *Perkins v. Cartmell*, 4 Harr. (Del.) 270; *Brooms v. Alston*, 8 Fla. 307; *Simms v. Smith*, 11 Ga. 195; *Cunningham v. McKindley*, 22 Ind. 149; *Wilson v. Greene*, 49 Iowa, 251; *Thomas v. Floyd*, 3 Litt. 177; *Pugh v. Bell*, 1 J. J. Marsh. 399; *Lexington v. Lindsey*, 2 A. K. Marsh. 443; *Turner v. Debell*, 2 Id. 384; *Clay v. Clay*, 7 Bush, 95; *Gordon v. Small*, 53 Md. 550; *Hemmenway v. Gates*, 5 Pick. 321; *Farnam v. Brooks*, 9 Id. 212; *Cooper v. Cooper*, 61 Miss. 676; *Cooke v. Williams*, 2 N. J. Eq. 209; *Shibla v. Ely*, 7 Id. 181; *Partridge v. Wells*, 30 Id. 176; *Decouche v. Savetier*, 3 Johns. Ch. 190; *Coster v. Murray*, 5 Id. 522; *Bertini v. Varian*, 1 Edw. Ch. 343; *Jones v. Person*, 2 Hawks, 269; *State v. McGowan*, 2 Ired. Eq. 9; *West v. Sloan*, 3 Jones Eq. 102; *Hamilton v. Smith*, Murph. 116; *Robertson v. Dunn*, 87 N. C. 191; *Starr v. Starr*, 2 Ohio, 321; *Coate's Estate*, 2 Pars. Sel. Cas. 251; *Lyon v. Marclay*, 1 Watta, 271; *Kut's Appeal*, 40 Pa. St. 90; *Willard v. Willard*, 56 Id. 119; *Chaplin v. Givens*, 1 Rice Ch. 132; *Pinkerton v. Walker*, 3 Hayw. 221; *Bryant v. Puckett*, 3 Id. 252; *Haynie v. Hall*, 5 Humph. 290; *Puison v. Ivey*, 1 Yerg. 296; *Armstrong v. Campbell*, 3 Id. 201; *Andrews v. Smithwick*, 20 Tex. 111; *White v. Leavitt*, 20 Id. 703; *Kennedy v. Baker*, 59 Id. 150; *Payne v. Hathaway*, 3 Vt. 212; *Evarts v. Nason*, 11 Id. 122; *Redwood v. Reddick*, 4 Munt. 222; *Bostwick v. Dickson*, 65 Wis. 593; but that in cases of implied or constructive trusts the statute will operate: *Boone v. Chiles*, 10 Pet. 177; *Elnendorff v. Taylor*, 10 Wheat. 152; *Beaubein v. Beaubein*, 23 How. 190; *Hayman v. Keally*, 3 Cranch C. C. 325; *Robinson v. Hook*, 4 Mass. 152; *Wisner v. Barneil*, 4 Wash. C. C. 631; *Martin v. Bank*, 31 Ala. 115; *Alston v. Alston*, 34 Id. 15; *Wilmerding v. Russ*, 33 Conn. 67; *Keaton v. Greenwood*, 8 Ga. 97; *Wyllly v. Collins*, 9 Id. 252; *Smith v. Calloway*, 7 Blackf. 86; *Talbot v. Todd*, 5 Dana, 199; *Pugh v. Bell*, 1 J. J. Marsh. 399; *Paine v. Hughes*, 2 B. Mon. 138; *Lexington v. Ohio R. R. Co.*, 7 Id. 556; *Manion v. Titsworth*, 18 Id. 582; *McDonnell v. Goldsmith*, 6 Md. 319; *Green v. Johnson*, 3 Gill & J. 389; *Harlow v. Dehon*, 111 Mass. 195; *Murdock v. Hughes*, 7 Smedes & M. 219; *Cooper v. Cooper*, 61 Miss. 676; *Johnson v. Smith*, 27 Mo. 591; *Cooke v. Williams*, 2 N. J. Eq. 209; *McClune v. Shepherd*, 21 Id. 76; *Cuyler v. Bradt*, 2 Caines Cas. 326; *Hawley v. Cramer*, 4 Cow. 717; *Kane v. Bloodgood*, 7 Johns. Ch. 90; *Edwards v. University*, 1 Dev. & B. 325; *Wagstaff v. Smith*, 4 Ired. Eq. 1; *Wheeler v. Piper*, 3 Jones Eq. 249; *Robertson v. Dunn*, 87 N. C. 191; *Walker v. Walker*, 13 Serg. & R. 379; *Rush v. Burr*, 1 Watts, 120; *Finney v. Cochran*, 1 Watts & S. 112; *Ball v. Lawson*, 4 Id. 557; *Ramsay v. Dens*, 2 Desaus. Eq. 238; *Mussey v. Mussey*, 2 Hill, 496; *Van Rhyn v. Vincent*, 1 McCord Eq. 310; *Singleton v. Moore*, Rich. Eq. 110; *Buchan v. James*, 1 Speers, 375; *Beard v. Stanton*, 15 S. C. 164; *Lloyd v. Currin*, 3 Humph. 462; *Haynie v. Hall*, 5 Id. 290; *Stephen v. Yandle*, 3 Hayw. 231; *Armstrong v. Campbell*, 3 Yerg. 201; *Cole v. Noble*, 63 Tex. 432; *Spotswood v. Dandridge*, 4 Hen. & M. 139; *Sheppards v. Turpin*, 3 Gratt. 373.

This doctrine has been admitted ever since the case of *Ohlmondeley v. Clinton*, 2 Jacob & W. 1. The principle upon which the rule is founded is, that in direct trusts "the possession of the trustee is the possession of the cestui, and that if he does not perform his trust his possession operates nothing as a bar, because his possession is according to his title": *Hovenden v. Annesley*, 2 Schoales & L. 607; *Smith v. King*, 16 East, 283; *Keene v. Deardon*, 8 Id. 248; *Smith v. Wheeler*, 1 Vent. 129; *Avery v. Holland*, 2 Over. 71; *Thompson v. Blair*, 3 Murph. 583; *Van Rhyn v. Vincent*, 1 McCord Eq. 314; but where trusts arise by operation of law from the fraud of one party, or the decree of

a court of equity, the possession of the trustee becomes adverse: *Thompson v. Blair*, 3 Murph. 583; *Van Rhyne v. Vincent*, 1 McCord Eq. 314; *Avery v. Holland*, 2 Over. 71.

It may be stated as a general rule that the statute, in cases of implied trusts, "runs from the time the act was done by which the party became chargeable as trustee by implication": *Wilmerding v. Russ*, 33 Conn. 77; or perhaps it may more properly be said, from the time when the cestui could have enforced his right by suit: *Kane v. Bloodgood*, 7 Johns. Ch. 90; *Robinson v. Hook*, 4 Mass. 152; *Keaton v. Greenwood*, 8 Ga. 97; *Cooper v. Cooper*, 61 Miss. 676; *Robertson v. Dunn*, 87 N. C. 191; *Cole v. Noble*, 63 Tex. 432. Where a person is converted into a trustee on the ground of fraud, the statute begins to run from the discovery of the fraud: *Moore v. Greene*, 19 How. 69; *Wheeler v. Piper*, 3 Jones Eq. 249; *Pugh v. Bell*, 1 J. J. Marsh. 399. And where relief is sought in equity, in case of an implied trust, it is said that equity will follow the law, and the equitable bar from lapse of time will be applied by analogy to the statute of limitations: *Baubien v. Baubien*, 23 How. 190; *Lafferty v. Turnley*, 3 Sneed, 157; *McDowell v. Goldsmith*, 6 Md. 319; *Harlow v. Dehon*, 111 Mass. 195; *Murdoch v. Hughes*, 15 Miss. 219; *Cuyler v. Brodt*, 3 Caines Cas. 326; *Lloyd v. Currin*, 3 Humph. 462; *Haynie v. Hall*, 5 Id. 296; *Armstrong v. Campbell*, 3 Yerg. 201; *Sheppards v. Hall*, 3 Gratt. 373. In Wood on Limitations, page 418, it is said that "if the statute were not permitted to operate when an implied trust exists, the exceptions would be endless, as in fact every case of deposit or bailment in a certain sense creates a trust, and the instances in which an implied trust may be raised are almost innumerable."

To exempt a trust from the bar of the statute, it must be a direct trust, of the kind which is cognizable exclusively in a court of equity: *Lyon v. Marclay*, 1 Watts, 275; *Morey v. Mason*, 8 Port. 211; *Carter v. Bennett*, 6 Fla. 214; *Thomas v. Brinsfield*, 7 Ga. 154; *Hayward v. Gunn*, 82 Ill. 385; *Raymond v. Simonson*, 4 Blackf. 77; *Lexington etc. R. R. Co. v. Bridges*, 7 B. Mon. 556; *Clay v. Clay*, 7 Bush, 95; *White v. White*, 1 Md. Ch. 53; *Johnson v. Smith*, 27 Mo. 591; *Prewett v. Buckingham*, 28 Miss. 92; *Partridge v. Wall*, 30 N. J. Eq. 176; *Paff v. Kinney*, 1 Bradf. 1; *Kane v. Bloodgood*, 7 Johns. Ch. 90; *Finney v. Cochran*, 1 Watts & S. 112; *Zacharias v. Zacharias*, 23 Pa. St. 452; *Pressley v. Davis*, 7 Rich. Eq. 105; *Cocke v. McGinnies*, Mart. & Y. 361; *Tinnen v. Mebane*, 10 Tex. 246. Though the trust must be direct, it need not be expressly created. If tacitly created by act of the parties, it is sufficient: *Starr v. Starr*, 2 Ohio, 321. If, however, the trust is one such as is cognizable in a court of law, or which is within the concurrent jurisdiction of courts both of law and equity, the statute will operate: *Lafferty v. Turnley*, 3 Sneed, 157; *Roosevelt v. Marks*, 6 Johns. Ch. 266; *Mann v. Fairchild*, 2 Keyes, 106; *McCrea v. Permont*, 5 Paige, 520; *Lindsay v. Hyatt*, 4 Edw. Ch. 97; *Armstrong v. Campbell*, 3 Yerg. 201; *Kennedy v. Baker*, 59 Tex. 150.

How Trustee of Direct Trust may Put Statute in Operation.—So long as the trust subsists, the possession of the trustee is the possession of the cestui que trust, and the statute does not run between them. But when the trustee denies the trust, and assumes ownership of the trust property in such a manner that the cestui que trust has actual or constructive notice of the repudiation of the trust, the statute attaches and begins to run from that time, for such denial and adverse claim are an abandonment of the fiduciary character in which the trustee has stood to the property: *Boteler v. Allington*, 3 Atk. 459; *Boone v. Chiles*, 10 Pet. 223; *Willson v. Watkins*, 3 Id. 252; *Phillippi v. Phillippi*, 115 U. S. 151; *Wood v. Wood*, 3 Ala. 756; *Lucas v. Daniels*, 34 Id.

188; *Hastie v. Aiken*, 67 Ala. 313; *Bonner v. Young*, 68 Id. 35; *McCarthy v. McCarthy*, 74 Id. 546; *Hearst v. Pryor*, 44 Cal. 235; *Jones v. Throckmorton*, 57 Id. 368; *Perkins v. Cartmell*, 4 Harr. (Del.) 270; *Scott v. Haddock*, 11 Ga. 258; *Robson v. Jones*, 27 Id. 266; *Owningham v. MacKindley*, 22 Ind. 149; *Wilson v. Greene*, 49 Iowa, 251; *Greene v. Johnson*, 3 Gill & J. 389; *Farnam v. Brooks*, 9 Pick. 212; *Murdoch v. Hughes*, 15 Miss. 219; *Hill v. Bailey*, 8 Mo. App. 85; *Smith v. Ricordo*, 52 Mo. 581; *Decouche v. Savatier*, 3 Johns. Ch. 219; *Kane v. Bloodgood*, 7 Id. 90; *Tinnen v. Mebane*, 10 Tex. 246; *White v. Leavitt*, 20 Id. 703; *Grumbles v. Grumbles*, 17 Id. 472; *Andrews v. Smithwick*, 20 Id. 111; *Lewis v. Castleman*, 27 Id. 407; *Starks v. Starks*, 3 Rich. 436; *Riphey v. Lodge*, 4 Serg. & R. 310; *Sheldon v. Sheldon*, 3 Wis. 699; *Bostwick v. Dickson*, 65 Id. 593. The trustee must show a plain, strong, and unequivocal renunciation to have the benefit of the statute: *Boteler v. Allington*, 3 Atk. 459; *Phillippi v. Phillippi*, 115 U. S. 151; *Jones v. Throckmorton*, 57 Cal. 368; *Grumbles v. Grumbles*, 17 Tex. 472; *Bostwick v. Dickson*, 65 Wis. 593, and the cases next above cited. And it must clearly appear that the *cestui que trust* had, or ought to have had, knowledge thereof, and that the trustee has been guilty of no fraud in that regard: *Phillippi v. Phillippi*, 115 U. S. 151; *Robinson v. Hook*, 4 Mass. 152; *Hastie v. Aiken*, 67 Ala. 313; *McCarthy v. McCarthy*, 74 Id. 546; *Jones v. Throckmorton*, 57 Cal. 368; *Keaton v. Greenwood*, 8 Ga. 97; *Robson v. Jones*, 27 Id. 266; *Roberts v. Burdell*, 61 Barb. 37; *Fox v. Cash*, 11 Pa. St. 207; *Houssal v. Gibbs*, 1 Bail. Eq. 311; *Moffatt v. Buchanan*, 11 Humph. 369; *Grumbles v. Grumbles*, 17 Tex. 472; *Andrews v. Smithwick*, 20 Id. 111; *Lewis v. Castleman*, 27 Id. 407. Mere delay in the performance of an express trust is not such a breach as sets the statute in motion: *Cooper v. Cooper*, 61 Miss. 676. But where an act is done by a trustee, which purports to be an execution of his trust, he is thenceforth to be regarded as standing at arms-length from the trustor, who is put to the assertion of his claims at the hazard of being barred by the statute: *Coleman v. Davis*, 2 Stro. 334; *Moore v. Porcher*, 1 Bail. Ch. 195; *Britton v. Rich*, 8 Rich. Eq. 271; *Robertson v. Dunn*, 87 N. C. 191.

The principle that the statute of limitations runs in favor of a trustee from the time of renunciation of the trust, or from the doing of an act purporting to be an execution of the trust, if the trustee has actual or constructive notice thereof, does not apply until the connection is so wholly at an end as to indicate that the *cestui que trust* is no longer controlled by the influence, preceeding from the trustee, which existed during the continuance of the trust: *Wellborn v. Rogers*, 24 Ga. 558; *Keaton v. McGuier*, 24 Id. 217; *Wheeler v. Piper*, 3 Jones Eq. 249.

Lapse of Time as Bar in Case of Express Trust.—The doctrine that a technical or direct trust is not barred by lapse of time is dispensed with in cases where circumstances exist calculated to raise a presumption from lapse of time of a discharge or extinguishment of the trust: *Phillips v. State*, 5 Ohio St. 122; *Davis v. Cotton*, 2 Jones Eq. 430; *Baker v. Whiting*, 3 Sum. 466. In order that lapse of time shall operate to raise a presumptive bar, the trustee must have so conducted himself with reference to the trust estate as to lead to the conclusion that he claimed and regarded it as his own; if he holds in recognition of the trust, no length of time will bar the *cestui que trust*: *Puison v. Iney*, 1 Yerg. 296. In this case, it was held that since the trustees, and those claiming under them, had not asserted an adverse claim above two years, the rights of the *cestui que trust* would not be barred, though he had neglected to claim the benefit of the trust for nearly forty years: Id.

After a long lapse of time, during which the character of the trust has

become obscure, or the acts of the parties and other circumstances create a presumption against it, a court of equity will decline to interfere: *Taylor v. Blair*, 14 Mo. 437; *Whedbee v. Whedbee*, 5 Jones Eq. 392. Thus in a Pennsylvania case when, after a delay of seventy years, a bill was brought for an accounting for certain stocks, which had been sold in trust for a person who was then dead, who knew the facts, but never set up any claim under the trust, the court refused to interfere: *Halsey v. Tate*, 52 Pa. St. 311; and see *Robertson v. Moskin*, 3 Hayw. 76; *Gregg v. Gregg*, 15 N. H. 190. In *Provost v. Grutz*, 6 Wheat. 481, it was said that after the lapse of forty years, and the death of all the original parties, the true and safe course of a court of equity in relation to a trust proved by strong circumstances to have once existed is to abide by the rule of law which, after a lapse of time, will presume payment of the debt, surrender of a deed, and extinguishment of a trust, where circumstances may reasonably justify it. And see *Perkins v. Cartmell*, 4 Harr. (Del.) 270, where extinguishment of the trust was presumed after twenty years' adverse holding. A bill by one of the next of kin of an intestate filed forty-six years after he had become of age, more than fifty years after the death of the intestate, and thirty-five years after the death of the surviving administrator, was held to be barred by the lapse of time: *Graham v. Torrance*, 1 Ired. Eq. 210. But in *Anstice v. Brown*, 6 Paige, 448, a bill by a *custui que trust* against the trustee to enforce the trust filed within twenty years after an admission of the trust in writing by the trustee, and within six years after a sale of the trust property by the trustee, was held to be in time. It is held, however, that a court of equity will refuse to interfere where there has been a clear breach of trust, and the *custui que trust* has for a long time acquiesced in the misconduct of the trustee, with full knowledge of the breach: *Broadhurst v. Belgany*, 1 Younge & C. 28.

INSTANCES OF VARIOUS TRUSTS WHICH ARE OR ARE NOT WITHIN OPERATION OF STATUTE OF LIMITATIONS. — It has been our endeavor in the preceding part of this note to present the rules governing limitations between trustor and trustee. In the subdivisions following, we have collected and classified, as far as possible, the large number of cases in which particular trusts have been held to be within or without the operation of the statute of limitations.

Agents, Factors, &c. — The relation of an agent to his principal is fiduciary in its nature, and if the party acts as a general agent or factor, with no stated time for accounting, the relation is rather that of trustee than of debtor, and the statute of limitations will not run until an account has been rendered or a demand therefor made: *Topham v. Braddick*, 1 Taunt. 572; *Clark v. Moody*, 17 Mass. 144; *Sawyer v. Lappan*, 14 N. H. 352; *Hutchins v. Gilman*, 9 Id. 360; *Murray v. Coster*, 5 Johns. Ch. 531; *Baird v. Walker*, 12 Barb. 298; *Taylor v. Bates*, 5 Cow. 379; *Davy v. Field*, 1 Abb. App. 490; *Hays v. Stone*, 7 Hill, 128; *Paschall v. Hall*, 5 Jones Eq. 108; *Krauss v. Dorrance*, 10 Pa. St. 462; *Parris v. Cobb*, 5 Rich. Eq. 450; *Hotes v. Stokes*, 2 Id. 133; *Hopkins v. Hopkins*, 4 Strob. Eq. 297. The principle here involved is, that the principal has no right of action, but merely an equitable right to an account, until demand, and hence either a demand must be proved, or a reasonable time within which to presume a demand must have elapsed: *Stamford v. Tuttle*, 4 Vt. 82; *Col-lard v. Tuttle*, 4 Id. 491; *Raymond v. Simonson*, 4 Blackf. 77.

Where, however, the agency is special, the statute attaches upon the consummation of each transaction, or the accrual of each item: *Hopkins v. Hopkins*, 4 Strob. Eq. 297; for it is the duty of the agent to account at once, and an action will lie without a demand.

In the case of an ordinary collecting agent, whose duty is to receive and

pay over money to his principal, the tendency of the courts is to hold that the statute begins to run immediately, regardless of whether a demand has been made, unless the agent has fraudulently concealed the fact of the receipt of the money by him: *East India Co. v. Paul*, 1 Eng. L. & Eq. 44; *Cogwin v. Ball*, 2 Ill. App. 70; *Emmons v. Hayward*, 6 Cush. 501; *Campbell v. Boggs*, 48 Pa. St. 524; *Etes v. Stokes*, 2 Rich. 320; *Hopkins v. Hopkins*, 4 Stro. Eq. 207; *Lawrence v. Smith*, 32 Wis. 587; or in any event, after a reasonable time in which to notify his principal: *McDonnell v. Montgomery Bank*, 20 Ala. 313; *Hickok v. Hickok*, 13 Barb. 632; *Mitchell v. McLemore*, 9 Tex. 151.

Where money was deposited with an agent to be loaned or invested, and no time for accounting was specified, it was held that the agent need not account until demand, and that the statute did not begin to run until then: *Joseph v. Baker*, 16 Cal. 173; *Hart's Appeal*, 32 Conn. 520.

In the case of a factor residing in another state, it has been held that he is not liable to an action until a demand, and hence that the statute will not run until then: *Green v. Williams*, 21 Kan. 64; *Murray v. Coster*, 5 Johns. Ch. 522. But it is said that if a demand is inconvenient, as where one is sent abroad to sell goods, with directions as to the mode of remittance, the statute would be held to run after a reasonable time: *Clark v. Moody*, 17 Mass. 145.

Partners. — Partners are trustees for each other, and the statute of limitations will not run against their liability to account to each other during the continuance of the partnership: *McNair v. Ragland*, 1 Dev. Eq. 533; *Hammond v. Hammond*, 20 Ga. 556. Whether the statute commences to run immediately upon a dissolution depends on the facts of each case: *Massey v. Twigle*, 29 Mo. 437. If the dissolution winds up the concern, and there are no further dealings between the partners, the statute, of course, runs at once. But where one partner is authorized by the agreement, upon dissolution, to carry on the business, so as to dispose of the firm assets, the trust continues, and the statute does not run: *Causler v. Wharton*, 62 Ala. 358. It is held that upon death of a partner, the statute runs at once: *Leakey v. Leakey*, Freo. Ch. 518; *Knox v. Gye*, L. R. 5 H. L. 674; *Weisman v. Smith*, 6 Jones Eq. 124.

Executors and Administrators. — Executors and administrators are direct trustees of the property of the decedent for the heirs or representatives, and cannot, as against them, set up the statute of limitations so long as the relation exists: *Arden v. Arden*, 1 Johns. Ch. 314; *Durden v. Gaskell*, 2 Yeates, 271; *Dillenbaugh's Estate*, 4 Whart. 177; *Decouche v. Savatier*, 3 Id. 316; *Norris's Appeal*, 71 Pa. St. 106; *Ward v. Ruder*, 2 Hen. & M. 154. The relation terminates with the dismissal of the executor or administrator, and the statute begins to run in his favor from that date: *Jacobs v. Pou*, 18 Ga. 546. Until then an action to compel a settlement by the administrator is not within the statute: *Brinkley v. Willis*, 22 Ark. 1; *Grant v. Hughes*, 94 N. C. 231. An executor does not cease to be a trustee upon the settlement of his accounts in the probate court, but will, if assets are left in his hands, continue to hold them for the purposes of the will as trustee: *Thompson v. McGaw*, 2 Watts, 161; unless he at the time denies that anything is due, in which case his holding is adverse, and the statute begins to run: *Dreisbach's Appeal*, 2 Rawls, 287; *Dabler v. Snavely*, 5 Watts, 225; *Webster v. Webster*, 10 Ves. 93.

A legacy is not necessarily held as a trust: *Dunden v. Gaskell*, 2 Yeates, 271; but it may be so held, and the legatee will not then be barred by lapse of time: *Phillips v. Munnings*, 2 Mylne & C. 309. Where an executor sets apart and appropriates a specific sum to satisfy a legacy, he is considered to

have changed the character of executor for that of trustee: *Byrchall v. Bradford*, Madd. & G. 13; *Dix v. Burford*, 19 Beav. 409; *Brougham v. Poulett*, 19 Id. 133; *Tyson v. Jackson*, 30 Id. 304. In *Dix v. Burford*, *supra*, an executor upon trust had assented to a specific legacy, and it was held that the legacy thereby became clothed with a trust. When a legacy of the residue or remainder of an estate is given, it is held that the executor becomes a trustee as soon as the residue is ascertained: *Willmott v. Jenkins*, 1 Beav. 401; *Davenport v. Stafford*, 14 Id. 319; *Bullock v. Downes*, 9 H. L. Cas. 1; *Ex parte Dover*, 5 Sim. 500. If an executor holding a legacy give notice to the legatee that unless it is claimed he will not pay it, this will be treated as a disavowal of the trust, and the statute will commence to run: *Robson v. Jones*, 27 Ga. 286; *Lewis v. Castleman*, 27 Tex. 407; *Coleman v. Davis*, 2 Strobl. Eq. 334. Long delay in making a demand for a legacy may raise a presumption, if the party knows of his rights, that it has been paid or that the legatee relinquished his claim to it: *Higgins v. Crawford*, 2 Ves. Jr. 572; *Parker v. Ash*, 1 Vern. 256; *Thompson v. McGaw*, 2 Watts, 161. Each case depends, however, on its peculiar circumstances, and where a party is ignorant of his rights, an account will be decreed after a considerable time has elapsed: *Pickering v. Stafford*, 2 Ves. Jr. 584; *Jones v. Tuberville*, 4 Bro. C. C. 114; *Dean v. Dean*, 9 N. J. Eq. 425. In *Peacock v. Black*, 4 Id. 61, where a bill to recover a legacy to a married woman was filed thirty-one years after the testator's death, twenty-four years after the settlement of the estate, and seventeen years after the death of the executor, and no cause for delay was shown, the bill was dismissed on the ground of presumption that the demand had been paid, arising from lapse of time.

Executors are not regarded as trustees for the creditors of the estate, and a mere bequest to the executor in trust to pay debts, or a mere direction in the will that the executor pay the debts, does not create a trust: *Oughterlongy v. Potts*, Amb. 321; *Proud v. Proud*, 32 Beav. 324; *Scott v. Jones*, 4 Clark & F. 382; *Blakeway v. Strafford*, 3 Penr. & W. 373; *Andrews v. Brown*, 3 Prec. Ch. 385; *Anonymous*, 1 Salk. 154; *Burke v. Jones*, 2 Ves. & B. 275; *Lewis v. Ford*, 67 Ala. 143; *Parker v. Cater*, 8 Tex. 318; nor will a testamentary provision that a debt barred by the statute be paid create a trust: *Smith v. Gillette*, 59 Id. 86; nor a provision authorizing debts to be paid, and empowering the executors to compound, compromise, submit to arbitration, or otherwise settle the same: *Bloodgood v. Bruen*, 4 Sand. 427. But where a testator creates a trust for the payment of certain creditors, naming them, it has been held that the executor holds as trustee: *Williamson v. Naylor*, 2 Younge & C. 210, note. A mere power in gross to sell realty for the payment of debts will not create the executor a trustee for the creditors: *Dickinson v. Teasdale*, 14 De Gex, J. & S. 52; *Hubbard v. Eppe*, 9 Baxt. 231. But it has been held that where realty is not regarded as assets in the hands of the executor or administrator for the payment of debts, such a devise will suspend the operation of the statute as to all debts not barred at the testator's decease: *Burke v. Jones*, 2 Ves. & B. 275; *Scott v. Jones*, 4 Clark & F. 382. An express testamentary trust for the payment of debts will not revive the statute as to debts which are barred, but may suspend the statute as to debts which are not barred, at the testator's death: *Agnew v. Tettermann*, 4 Pa. St. 56. Where a debtor promises that if the creditor will wait, he shall be paid from a provision to be made for him in the debtor's will, and the debtor makes such a will but afterwards revokes it, it is held that nothing has been done which affects or suspends the running of the statute: *Petrie v. Mott*, 38 Hun, 259.

An executor entering upon and holding the lands of the testator does so

as trustee, unless it is clearly proved that he claims adversely with notice to the heirs or devisees: *Ramsay v. Deaz*, 2 Desana. Eq. 233.

An administrator purchasing at his own sale, without any attempt at concealment, holds adversely to the heirs, and no trust is created: *McGaughey v. Brown*, 46 Ark. 25; or at most an implied trust, which will be barred after expiration of the statutory period: *Schwindersine v. Miscally*, 1 Bail. Eq. 304.

The statute of limitations will run in favor of executors *de son tort*: *Boyd v. Lee*, 12 Lea, 77. An executor who has not proved the will, but who is permitted by his co-executors who have proved it, to take into his hands funds of the estate, does not become a trustee as to them of the property so received; and the statute of limitations will bar a suit in equity against him, which is not brought within a limited time: *Marak v. Oliver*, 14 N. J. Eq. 259. In a suit by executors for a share of fees due their testator for professional services as attorney for the estate, the statute was pleaded in bar, to which was pleaded on trial an alleged trust: held, that there being no fraud or concealment in receipt of the fees, and no proof that he agreed to hold them in trust, no such trust arose as would prevent the running of the statute: *Webster v. Newbould*, 41 Pa. St. 482.

The executor or administrator of a trustee for another cannot plead the statute in bar of a claim of the *cestui que trust* for settlement of the trust: *Johnson v. Overman*, 2 Jones Eq. 182. If, however, a liability of a decedent originating in a trust assumed the character of a debt merely, the *cestui que* was would of course become a mere creditor, and liable to be barred as such: *Trecothick v. Austin*, 4 Mass. 18.

Guardian and Ward—Infancy.—A guardian stands in the relation of trustee to the ward, and the statute is not applicable to his account: *Kimball v. Ives*, 17 Vt. 430; *Mathes v. Bennett*, 21 N. H. 204; *Chamberlain v. Holey*, 55 Vt. 378. It has been held that even after the relation is terminated the statute will not bar a guardian's claim against his ward if the delay is sufficiently explained: *Kimball v. Ives*, *supra*. Thus in *Hayden v. Stone*, 1 Duvall, 396, where a person received money as guardian a few days after his technical guardianship had expired, his ward continuing as before one of his household, he still maintaining the practical relations of curator, it was held that he could not be protected by the statute of limitations against the claim of the ward for the money. But in *Taylor v. Kilgore*, 38 Ala. 264, the contrary was held, and this, it is said by Wood, seems to be the better ruling: Wood on Limitations, sec. 204. Where the cause of action arises from matters accruing after the guardianship has ceased, however, it seems proper that the statute should not operate: *Shearman v. Abins*, 4 Pick. 283.

After an infant ward comes of age, the fiduciary relation of the guardian ceases; they stand as debtor and creditor, and the claim of the ward is clearly subject to be barred by the statute of limitations: *Bull v. Tossion*, 4 Watts & S. 557; *Bertine v. Varian*, 1 Edw. Ch. 343.

A man intruding upon the estate of an infant, and taking the profits thereof, will be treated as guardian, and cannot set up the statute of limitations against the claims of the infant: *Goodhue v. Barnwell*, Rice Ch. 198. Where a father receives a legacy of his minor child, a trust is raised by operation of law in respect to the funds so received, which is within the operation of the statute, the father having no right as natural guardian of his children to intermeddle with their estate: *Haynie v. Hall*, 5 Humph. 290. Where a sale of infant's property was made by a master under a decree, by which he was directed to sell and apply the interest, and as much as might be necessary of the principal of the proceeds, to the support of the infant, it was held that

he was a trustee, and that the statute did not run against a suit by the infants for an account, until he had denied his liability: *Housell v. Gibbs*, 1 Bail. Ch. 482. In *Owen v. Owen*, 62 Md. 492, a husband and wife conveyed all of the wife's property on naked trust for use of the infant, the husband continuing to manage it. It was held that a trust was created against which the statute would not run. The statute of limitations does not run in favor of a trustee of a minor *cestui que trust* to bar a recovery for waste committed by him on the trust estate during the minority of the *cestui*: *Wyant v. Dieffenhafer*, 2 Grant Cas. 334.

Vendor and Vendee. — After a sale of real estate and before a conveyance, the vendor in possession is held to be the trustee of the legal title for the vendee, and the vendor's possession, while it can be reasonably supposed to be in accordance with the trust, will be construed to be that of the vendee, and the statute of limitations will not operate: *Graham v. Nelson*, 5 Humph. 606; *Harris v. King*, 16 Ark. 122; *Scarlett v. Hunter*, 3 Jones Eq. 84. Equity treats the vendee who has fully performed, on his part, as the absolute owner, and the vendor as a naked trustee charged with the simple duty to convey to the vendee upon demand, and the statute does not begin to run upon his right to a specific performance, until the vendor has given notice of his intention not to convey, or has done some other unequivocal act indicating that he claims and holds the land adversely: *Love v. Watkins*, 40 Cal. 547; S. C., 6 Am. Rep. 624. If the vendee is in possession under his contract, the statute cannot run upon his right to a conveyance: *Bodley v. Ferguson*, 30 Cal. 511; *Morrison v. Wilson*, 13 Id. 496; *Love v. Watkins*, 40 Id. 547; S. C., 6 Am. Rep. 624; *Richardson v. Kuhn*, 6 Watts, 299; *Martin v. Willink*, 7 Serg. & R. 297; *Hemming v. Zimmerchitte*, 4 Tex. 159; *Mitchell v. Shepperd*, 13 Id. 484; *Holman v. Criswell*, 15 Id. 394; *Vardeman v. Lawson*, 17 Id. 10; *Newton v. Davis*, 20 Id. 419.

Purchaser for Another's Benefit. — Where one by agreement purchases land with another's money for his benefit, but takes the title in his own name, a trust is created by consent of the parties, and the statute will not commence to run until a repudiation of the trust and adverse claim by the trustee: *Hutchinson v. Hutchinson*, 4 Deans. Eq. 77; *McDonald v. May*, 1 Rich. Eq. 91; as where a husband purchased with his wife's money, taking the title in his own name: *Milner v. Hyland*, 77 Ind. 458. But where the trustee took the conveyance in his own name, without the consent of those whose money paid for it, his holding would be adverse, and the statute would run at once: *Kennedy v. Kennedy*, 25 Kan. 151. Where one purchases with his own money, on an agreement to hold the property for the benefit of another, this creates merely a technical trust subject to the bar of the statute: *McDonald v. May*, 1 Rich. Eq. 91; *Hughes v. Hughes*, Cheves L. & Eq. 33.

Power to Sell. — A simple power to sell property does not create an express trust which suspends the operation of the statute of limitations: *Dickinson v. Teasdale*, 14 De Gex, J. & S. 52. But a power of attorney given by A to B, placing the whole property of A at the disposal of B, with full authority to collect all claims, and make sale of all property, real or personal, and out of the interest of the proceeds to pay for the maintenance of A, with a provision that B shall account whenever desired, is a direct trust, which lapse of time or the statute of limitations will not bar: *Cooks v. Williams*, 2 N. J. Eq. 209.

Assignee for Benefit of Creditors. — An assignee in bankruptcy or insolvency, or for the benefit of creditors generally, as soon as the property becomes vested in him, becomes a trustee for the creditors, and from that time

the statute ceases to run against them: *Ex parte Ross*, 2 Glyn & J. 46, 330; *In re Eldridge & Co.*, 12 Nat. Bank. Reg. 540; *Minot v. Thacher*, 7 Met. 348; *Millar v. Clark*, 7 Id. 435; *In re Leiman*, 32 Md. 225; *Heckert's Appeal*, 24 Pa. St. 482; *Lomax v. Pendleton*, 2 Call, 538.

Money Held in Trust. — Where money is held in trust, and is therefore not recoverable at law, the statute of limitations will not run: *Kute's Appeal*, 40 Pa. St. 90. Deposit of money to be kept until demand creates an express trust, and the statute runs only from the time of the demand: *Zuck v. Culp*, 59 Cal. 142. Where a trustee converted trust moneys, held that the statute did not begin to run until the cestui had notice of the conversion: *Terry v. Bale*, 1 Demarest, 452. If a sheriff and judgment creditor hold money in trust to pay over to other creditors, who have appealed from that judgment, they cannot avail themselves of the bar of the statute: *Guy v. Edwards*, 30 Miss. 218. A surplus paid to a town to equalize bounties due to soldiers is held in trust for the soldiers, and the statute does not run against their action to recover the same: *McGuire v. Linneus*, 74 Me. 344. A county, being a direct trustee in disbursing school funds, cannot, in an action by the attorney-general of the state to recover funds unlawfully paid to a county officer for collecting and disbursing such funds, plead the statute: *Rush v. Commissioners*, 103 Ind. 497. County taxes, illegally exacted, are not held in trust for the tax-payer, so that the statute cannot be pleaded in an action to recover them: *Newcom v. Bartholomew County*, 103 Id. 526. An order by a cestui que trust to pay five hundred dollars from his estate, accepted by the trustee and assigned by the payee, constitutes a direct trust between the trustee and the assignee, which is not within the operation of the statute: *Bigelow v. Callin*, 50 Vt. 408.

Trustee's Liability for Breach of Trust creates a simple debt, and will be barred by the statute of limitation: *Farr v. Farr*, 1 Hill Ch. 387; *Britton v. Lewis*, 8 Rich. Eq. 271. Though it is said that if the trust be created by specialty, neither the trustee nor his executor can plead the statute: *Brettelbank v. Goodwin*, L. R. 5 Eq. 545; *Baker v. Martin*, 5 Sim. 380; *Obee v. Bishop*, 1 De Gex, F. & J. 137; *Story v. Gape*, 2 Jur., N. S., 706.

CESTUI BARRED WHEN TRUSTEE BARRED. — Where the trustee is barred by the statute of limitations, it is said that the cestui que trust is also barred: *Cholmondeley v. Clinton*, 2 Mer. 360; *Molton v. Henderson*, 62 Ala. 426; *Pendergast v. Foley*, 8 Ga. 1; *Wingfield v. Virgin*, 51 Id. 139; *Brady v. Walters*, 55 Id. 25; *Goss v. Singleton*, 2 Head, 67; *Williams v. Otey*, 8 Humph. 563; *Woolbride v. Planters' Bank*, 1 Sneed, 297; whether he be under a disability or not: Id.; *Parker v. Hall*, 2 Head, 641; *Weaver v. Leiman*, 52 Md. 706; *Wingfield v. Virgin*, 51 Ga. 139. But this rule applies only when the cestui has the mere equitable interest, and the trustee is competent to sue, but fails to do so: *Parker v. Hall*, 2 Head, 641; *Weaver v. Leiman*, 52 Md. 706. If the legal title is in the cestui que trust, or is cast upon him by operation of law, he will not be barred, though the statute has run against the trustee: *Wingfield v. Virgin*, 51 Ga. 139. And if the trustee has estopped himself from suing, by a sale of the property, thus uniting with the purchaser in a breach of trust, the wrong is to the beneficiaries, not to him. He cannot sue, and the beneficiaries, therefore, if under disability, are not affected by the statute: *Parker v. Hall*, 2 Head, 641; *Evertsen v. Tappen*, 5 Johns. Ch. 497; *Jones v. Goodwin*, 10 Rich. Eq. 226; *Fish v. Wilson*, 15 Tex. 430.

One who purchases of a trustee trust property, *bona fide*, and without notice of the trust, acquires a good title against the cestui que trust: *Prevost v. Walters*, 5 Ill. 35; *Wyse v. Dandridge*, 35 Miss. 672; *Christmas v. Mitchell*, 3

Ired. Eq. 535; *Henderson v. Dodd*, 1 Bail. Eq. 138; *Hudnal v. Wilder*, 4 McCord, 294; *Bracken v. Miller*, 4 Watts & S. 102; but a purchaser with notice, actual or constructive, of the trust, holds the title as trustee, and stands in the place of his grantor, and is chargeable with the trust: *Jones v. Shattuck*, 41 Ala. 262; *Webster v. French*, 11 Ill. 254; *Stewart v. Chadwick*, 8 Iowa, 463; *Puison v. Ivey*, 1 Yerg. 296; *Thayer v. Cramer*, 1 McCord, 395; *Wambursee v. Kennedy*, 4 Desaus. Eq. 479. Where one borrowed trust money, knowing it to be such, it was held that he could not plead the statute in bar to a suit for recovery of the debt: *Merriman v. Cannovan*, 9 Baxt. 93. In *Jones v. Goodwin*, 10 Rich. Eq. 226, a person purchased of a husband who was trustee for his wife, a negro slave, the purchaser having notice of the trust, and the wife being ignorant of the sale. It was held that he could not acquire a title under the statute of limitations as against the wife. If a grantor from a trustee can show a clear renunciation by the trustee, he may acquire a title by adverse possession: *Boteler v. Allington*, 3 Atk. 459.

STATUTE OF LIMITATIONS AS BETWEEN BAILOR AND BAILEE. — The legal title to property bailed is in the bailor, and not in the bailee, and the bailor is entitled to have the possession of the property upon demand, subject to the conditions of any agreement between the parties; and upon a refusal by the bailee, a right of action at law immediately accrues. Bailments are therefore not trusts in any sense which will exempt them from the operation of the statute of limitations: See Wood on Limitations, sec. 200, p. 418.

DONOHUE v. GAMBLE.

[38 CALIFORNIA, 341.]

WHETHER NEGOTIABLE PAPER IS HELD IN MORTGAGE OR PLEDGE, which is indorsed to and held by a creditor as security for the payment of a debt, without any other express agreement, *quære*.

WHETHER FORECLOSURE AND SALE OF NEGOTIABLE INSTRUMENT HELD IN PLEDGE can be decreed in satisfaction of the debt for which it is held, under ordinary circumstances, *quære*.

FORECLOSURE AND SALE OF NEGOTIABLE INSTRUMENT HELD AS PLEDGE is authorized, when the maker resides in a remote country or a different state, and it does not appear that he has any property within the jurisdiction subject to seizure and sale.

ACTION praying foreclosure and sale of note held by plaintiff as security for the payment of a debt due from defendant. The opinion states the facts.

Doyle and Barber, for the appellants.

Wilson and Crittenden, for the respondent.

By Court, CROCKETT, J. The facts of the case are, that the plaintiffs loaned to the defendant five thousand dollars in gold coin, and took his promissory note therefor. At the same time, and as collateral security, the defendant indorsed, transferred, and delivered to the plaintiffs a promissory note of one Fer-

guson for twelve thousand dollars, payable to the defendant on his order or demand. It further appears that a large proportion of the debt from the defendant to the plaintiffs remains due and unpaid; that Ferguson resides in the state of New York, and the plaintiffs caused the note for twelve thousand dollars to be presented to him for payment, which was refused, and the note was thereupon protested for non-payment.

The complaint in this action states, substantially, the foregoing facts, and prays for a foreclosure and sale of Ferguson's note in satisfaction of the debt due from the defendant, and for a personal judgment against the defendant for the deficiency. The answer does not deny the foregoing facts, but sets up as a defense to the action that it is the duty of the plaintiffs to collect Ferguson's note by process of law, and apply the proceeds to the satisfaction of their demand; and that the court has no authority to decree a foreclosure and sale. On the trial, the district court decided the transaction to be a pledge, and not a mortgage of Ferguson's note; and held, as a conclusion of law, that the plaintiffs, as pledgees, have no authority to sell the note, or cause it to be sold, in satisfaction of their demand, and cannot maintain an action for the foreclosure and sale thereof.

The court also refused to enter a personal judgment against the defendant for the amount due, and dismissed the complaint with costs; and thereupon the plaintiffs have appealed.

If the transaction be held to be a chattel mortgage, and not a pledge, it is conceded by counsel that it might be foreclosed, as any other mortgage. Treating it as a mortgage, no reason has been suggested why it might not be foreclosed. Nor do we understand counsel as controverting the proposition that a pledgee of personal property may, if he elects so to do, cause the pledge to be sold under a decree of a court of equity in satisfaction of the debt. But it is insisted that a pledge of commercial paper, such as notes, bonds, and bills, stands upon a different footing, on account of their peculiar nature; that in the absence of a contract to that effect, authorizing a sale of them, the pledgee has no power to sell them or cause them to be sold by a decree of a court or otherwise, and can only make them available by collecting them in due course of law.

For the purposes of this decision, we shall assume that the transaction in question was a pledge and not a chattel mortgage, and shall assume it, also, as a conceded point, that a pledge of personal property may be foreclosed by a decree of

a court of equity in the same manner and with like effect as if it were a mortgage. This brings us to the question whether or not a pledge of a bond, bill, or promissory note stands upon a different footing. The argument for the respondent on this point is founded chiefly on considerations of public policy. It is said that to permit a sale of such securities would often, and perhaps generally, result in a ruinous sacrifice greatly injurious to the debtor, and equally so to the creditor, unless he should avail himself of his superior information in respect to the solvency of the maker of the paper, to purchase it at the sale for less than its value, which would be a great hardship upon the pledgor; that a sale of the paper is not necessary to enable the pledgee to make it available for the satisfaction of his demand, inasmuch as he is clothed with the necessary power to enable him to enforce the collection of the security pledged, which is all that the pledgee can reasonably demand.

The leading case relied upon in support of this proposition is *Wheeler v. Newbould*, 5 Duer, 29, and afterward affirmed in 16 N. Y. 392.

The facts of the transaction in that case were very similar to those we are considering; but in that case, instead of resorting to a court of equity to procure a judicial sale of the note which was pledged, the pledgee caused it to be sold in the market, without a proper demand and notice, and it was the validity of that sale which was in contest. The court held the sale to be void,—1. For want of a proper notice; and 2. On the ground that, in the absence of a contract expressly authorizing a sale, the law would not imply an authority in the pledgee to sell the security for his indemnity, nor any authority except to collect the amount due on the notes which were pledged, and to apply the proceeds in satisfaction of his demand. The precise point before us in this case, to wit, the right of a pledgee to resort to a court of equity for a sale of the security, was not involved in that case. The court does not decide that under special circumstances a sale may not be decreed. On the contrary, it says: "In holding as we do, that a pledge of choses in action created by private individuals, and having no market value, is not an implied authority to sell them, we are not to be understood as saying that a sale may not, under special circumstances, be decreed by a court of equity. We decline, however, to express or intimate an opinion upon a question which is not before us, and which, when it arises,

will demand a serious consideration." It is evident, however, that the court intimates that a sale could only be decreed under special circumstances.

In *Brown v. Ward*, 3 Duer, 660, and in *Atlantic Fire and Marine Ins. Co. v. Boies*, 6 Id. 583, similar views are expressed in respect to the authority of the pledgee to sell commercial paper pledged as security in satisfaction of the debt. These are the only authorities to which our attention has been called in support of the proposition; and however the law on that point may be in New York, I am satisfied a different rule must prevail here.

Under section 246 of our Practice Act, if commercial paper be mortgaged, the mortgage may be foreclosed, and the securities sold under the decree; and by sections 217 and 220, such securities may be seized and sold under execution on a judgment at law: *Davis v. Mitchell*, 34 Cal. 87. We must infer that the policy of our law is not opposed to such sales, when they are expressly authorized on the foreclosure of a mortgage, or upon seizure under an execution at law. The same reasons which would forbid the sale of commercial paper which is pledged would apply with full force to a sale of such paper under the foreclosure of a mortgage, or under an execution at law. In each case, the danger of sacrificing it for an inadequate price would be the same; and inasmuch as a sale is expressly authorized in the two latter cases, we can perceive no reason why a different rule should prevail when it is pledged.

The conclusion reached by the court in *Wheeler v. Newbould*, 2 Duer, 29, and the other cases referred to, is founded on the assumption that commercial paper has no intrinsic market value; that it is not, strictly speaking, merchandise; that its value depends on the solvency of the maker, which may not be generally known; and hence, that if exposed to sale, it would generally sell for an inadequate price, and result in a ruinous sacrifice to the pledgor. It is conceded, in these cases, that the bonds of railroad and other like corporations do not fall within the rule, inasmuch as they generally pass by delivery, and have a well-known market value, and therefore are not likely to be sacrificed at a sale on proper notice.

This distinction, however, would appear to be more fanciful than real. Commercial paper, of course, depends for its market value upon the supposed solvency of the maker, and in the neighborhood where he resides it is generally not difficult

to ascertain the estimate in which he is held in this respect. At a place remote from his residence, it might be difficult or impossible to form any opinion on the subject. In the city of New York no one would doubt the solvency of a citizen generally known to be enormously wealthy; and his promissory note would doubtless sell for its full value. In a country village in California, he might be wholly unknown, and his promissory note in that locality might, and probably would, have little or no market value. But the same rule applies to corporations. The commercial value of their paper depends upon their supposed solvency. In places where they are known and supposed to be solvent, it would bring its full value in the market; but in remote places, where they are unknown, it might have no market value whatever, however solvent the corporation might be. It is apparent, therefore, that the market value of commercial paper, and of the bonds of public or private corporations, depends on the same conditions, to wit, the extent to which the makers are known in the particular locality, and the estimate in which their solvency is held. The market price of the security, whether of private persons or of corporations, will vary in proportion as the makers of it are, much or little, favorably or unfavorably, known at the place of sale; and though some corporations may be more widely known than a majority of private citizens can be, on the other hand there are many private citizens more generally known than a majority of corporations, and whose wealth and credit are on as stable a basis as those of any corporation. These being the facts, I can perceive no valid reason for the distinction made by the New York courts between the two classes of securities, and the rule which they establish will be found, I think, to be inconvenient and impracticable.

But it is conceded that the pledgee may resort to a court of equity for a foreclosure and sale in special cases; and, in my opinion, the case we are considering comes within that category. Ferguson, the maker of the note pledged to the plaintiff, resides in New York, and it is not shown that he has any estate in California subject to seizure and sale. The same reasons which would require the plaintiffs to pursue him with legal process in the courts of New York would equally demand that they should follow him to Europe, South America, or any other foreign country, where he might be known to be domiciled. This would impose a hardship on the pledgee,

which evidently was not within the contemplation of the parties. If that be the rule, the pledgee would be forced to incur all the trouble, expense, and hazard of pursuing the maker through the courts of a foreign country, and perhaps might realize nothing in the end. We think he is under no obligation to incur this trouble and expense, but may go into equity for a foreclosure and sale of the note for whatever it will bring in the market at a judicial sale. The pledgor has due notice of the proceeding, and if the security should bring an inadequate price at the sale, it will be his misfortune, which he might have guarded against by a proper stipulation in the contract. This view of the case renders it unnecessary for us to decide whether the plaintiffs were entitled to a personal judgment against the defendant on the pleading.

Judgment reversed, and cause remanded for a new trial.

RHODES, J., dissented.

RIGHTS AND REMEDIES OF PLEDGEE OF PROPERTY WHICH HE HOLDS AS COLLATERAL SECURITY: See *Robinson v. Hurley*, 79 Am. Dec. 497, and note 499-505, where, at page 505, the principal case is cited.

HUNT v. LOUCKS.

[88-CALIFORNIA, 372.]

EXECUTION WHICH DIRECTS LEVY OF MORE MONEY THAN JUDGMENT CALLS FOR IS VOIDABLE MERELY, AND NOT VOID.

EXECUTION DIRECTING LEVY OF MORE MONEY THAN JUDGMENT CALLS FOR will not be set aside, but will be amended to agree with the judgment, upon application of the parties or either of them.

SALE UNDER VOIDABLE EXECUTION TO BONA FIDE PURCHASER IS VALID, although the execution be afterwards set aside; but a sale under a void execution is absolutely void, and will pass no title, even to a *bona fide* purchaser.

WHETHER PARTY TO EXECUTION CAN BE BONA FIDE PURCHASER, *quære*.

EXECUTIONS ARE NOT VOID THAT HAVE BEEN ISSUED ACCORDING TO ESTABLISHED COURSE OF PRACTICE, and are not so erroneous that they cannot be amended.

COMMON-LAW RULES AS TO VALIDITY OF JUDICIAL SALES ARE NOT CHANGED by section 237 of the California Practice Act, concerning rights of purchasers who have been evicted. That section merely guards against mischievous consequences in certain cases, by affording a remedy which the common law did not.

EXECUTION NOT UNDER SEAL, ISSUED FROM COURT WHICH HAS BEEN ABOLISHED, or upon a void judgment, or upon a judgment against an administrator, or upon the death of the judgment debtor, or after an appeal and stay, are instances of executions which are probably void.

ERRONEOUS OR VOIDABLE EXECUTIONS CANNOT BE COLLATERALLY ATTACKED. EXECUTION IS NOT IRREGULAR WHICH CALLS FOR AMOUNT OF JUDGMENT, AND COSTS OF AN APPEAL THEREFROM.

PURCHASER'S TITLE AT SALE UNDER EXECUTION DOES NOT DEPEND UPON OFFICER'S RETURN for its validity, and is not affected by the fact that the return fails to show a legal or any levy.

EJECTMENT. The opinion states the facts.

George F. and W. H. Sharp, for the appellant.

J. M. Seawell, for the respondent.

By Court, SANDERSON, J. The plaintiff claimed title founded upon a sale under an execution, to which neither he nor the defendant's lessor was a party. In support of his claim, he produced at the trial a judgment, execution, and sheriff's deed. To this testimony the defendant demurred, upon three grounds: 1. That the execution was void because it varied materially from the judgment; 2. That it was void because it appeared upon its face to have been issued upon two separate judgments; 3. Because the return, indorsed upon the execution, did not show a sufficient levy.

In view of these objections, the court below excluded the testimony, and the plaintiff was accordingly nonsuited. Whether this testimony ought to have been admitted is the only question presented for our consideration.

1. The ground of the first objection was, that the execution called for \$695 more than the face of the judgment. Was it for that reason void, and therefore the sale also? We think it was only voidable, and therefore the sale valid.

It cannot be denied that to sustain a title founded upon a sheriff's sale a judgment must be produced; an execution, which the judge can affirm, was issued upon the judgment produced, and a deed which was given in pursuance of the execution and the sale under it. Unless it appear that the judgment, execution, and deed are links of the same chain, the title will fail. But a question of variance between them must not be confounded with the question of their validity. The two propositions are quite separate and distinct. The former is a question of identity only; the latter assumes or concedes the identity, and goes only to the validity of the suspected instrument. If the execution differs so materially from the judgment that the judge cannot affirm that the former was issued upon the latter, his conclusion is, not that the execution is void, but that it was not issued upon the judgment which

has been exhibited with it. The conditions upon which the two questions arise are not only different, but the question of void or voidable does not arise until the question of variance has been considered.

That this execution was issued upon the judgment which was exhibited with it does not admit of a rational doubt. The recitals in the execution correspond with the judgment in every particular except as to the amount; the court, the date, the parties, the general character of the judgment, are all correctly stated in the execution; and it is not pretended that there is or was any other judgment of the same court, of the same date, between the same parties, and of the same general character, upon which the execution could have been issued. Such being the case, there is no rational ground for saying that the judgment and execution are not parts of the same judicial proceedings; and we do not understand counsel as disputing this proposition, but as conceding it, and insisting only that the execution is void because it calls for too much money.

That, as a general rule, an execution must follow the judgment, and conform to it, and that if it varies materially from it, it will be set aside, or quashed, or amended, as the case may be, upon the motion of the parties to it, who are prejudiced by the error, is undoubtedly true, as appears by the cases cited by counsel. But that and nothing more being shown, we have made but little progress in the present case. The question is not as to what the court would have done with this execution if the defendants in the judgment had moved to set it aside,—to quash or amend it as they might have done. If such was the question, it could be readily answered. The court would not have set it aside, but would have allowed it to be amended so as to conform to the judgment; that is to say, it would have quashed it only as to the excess: *Stevenson v. Castle*, 1 Chit. 849; *King v. Harrison*, 15 East, 615; *Morriss v. Leake*, 8 Term Rep. 416, note a; *McCullum v. Hubbert*, 13 Ala. 282 [48 Am. Dec. 56]. But quite a different question is here presented,—one which rests upon entirely different conditions, and involves altogether different principles. It is as to what ought to be done with such an execution when it comes before the court collaterally as evidence of title in an action which is not even between the parties to the execution, but between entire strangers to it, and where it is not pretended that the execution was ever, at any time, even after the sale, set aside upon the application of the parties, who alone were injured by the error.

We understand the settled rule to be, that if the execution be merely erroneous,—that is to say, voidable,—a sale under it to a *bona fide* purchaser will be valid, although the execution be afterwards set aside; but if the execution be irregular,—that is to say, void,—a sale under it, even to a *bona fide* purchaser, will also be void: *Woodcock v. Bennet*, 1 Cow. 711 [13 Am. Dec. 568]. Said Lord Chancellor Hardwicke, in *Jeanes v. Wilkins*, 1 Ves. Sen. 195: “To avoid the sale and title of the defendant [purchaser], it must be proved that the *fi. fa.* was void, and conveyed no authority to the sheriff; for it might be irregular, and yet, if sufficient to indemnify the sheriff, so that he might justify in an action of trespass, he might convey a good title, notwithstanding the writ might be afterward set aside.” Said Chief Justice Savage, in *Jackson v. Cadwell*, 1 Cow. 644: “It may be considered settled law that a *bona fide* purchaser at a sheriff’s sale acquires a valid title as against the defendant in the execution, unless it is not only voidable but absolutely void.” This is but an extension to cognate conditions of a rule which no one disputes,—that a sale under an execution upon a judgment which is merely erroneous, and therefore only voidable, is valid if made to a *bona fide* purchaser while the judgment remains unreversed, though it be otherwise if the judgment be absolutely void: *Harris v. Reynolds*, 14 Cal. 667 [73 Am. Dec. 600]; *Johnson v. Lamping*, 34 Id. 293. The rule is founded upon considerations of public policy; and in *Manning’s Case*, 8 Coke, 97 a, the reason is given thus: “If the sale of the term should be avoided, the vendee would lose his term and his money too, and thereupon great inconvenience would follow, that none would buy of the sheriff goods or chattels in such cases, and so execution of judgments (which is the life of the law in such case) would not be done”; or if done, it might have been added, so done as to greatly prejudice both debtors and creditors. It may be said that this reason, so far as it includes the loss of both the term and his money to the purchaser, is without foundation in this state, by reason of section 237 of the code, which has provided certain remedies to prevent such a loss; but if so, the answer is, that it was not the object of that provision of the code to disturb the rule of the common law in relation to the validity of executions or judicial sales, but to guard against its mischievous consequences in certain cases, by affording a remedy which the common law does not. It does not deal at all with the question as to when an execution or a sale shall be deemed valid and when

not, but leaves it as it was before, and merely provides that when, for any of the reasons given by the common law, a sale shall be declared void, the purchaser shall not be left, as at common law, without a remedy: *Woodcock v. Bennet*, 1 Cow. 741 [13 Am. Dec. 568].

In conclusion, upon this branch of the general topic, it is proper to add that, according to some of the cases, a party to a judgment or writ is not a *bona fide* purchaser within the meaning of this rule, the reason given being that he is chargeable with notice of all defects in the judgment, or execution, as the case may be. Whether this distinction be well or ill founded is not pertinent to the present inquiry; for the purchaser in this case was not a party to the execution, and is therefore entitled to the full benefit of the rule.

It may not be easy to lay down a general rule by which, in all cases, the validity of an execution can be measured, and its qualities, as void or voidable, readily and accurately ascertained. An execution not under seal; or issued from a court which has been abolished: *Lee v. Newkirk*, 18 Ill. 550; or out of a court not of competent jurisdiction; or upon a void judgment; or upon a judgment against an executor or administrator: Probate Act, sec. 140; or perhaps in any case where its issuing is prohibited by law or an order of the court, as, for instance, when the judgment debtor has died: Probate Act, sec. 141; or has appealed and given a stay bond,—may all be examples of void executions, but we do not undertake to say they are; we merely refer to them by way of illustrating the difference between void and voidable executions. It has been said that if a state of facts exists at the time the execution is issued, in view of which it is unlawful to issue it, the execution is irregular, and therefore void: *Woodcock v. Bennet*, 1 Cow. 739 [13 Am. Dec. 568]. It is probable that the rule thus stated is too broad; and if it is not, it is quite certain that it is of little value as a guide, for in a certain sense every execution which has been issued when it ought not to have been has been unlawfully issued. Yet, by the cases, such executions are not always held to be void; as, for example, where they have been issued upon dormant judgments without leave: *State v. Morgan*, 7 Ired. 387; *Dawson v. Shepperd*, 4 Dev. 497; *Mariner v. Coon*, 16 Wis. 465. But be that as it may, it is obvious, we think, that an execution which has been issued according to the established course of practice (*Luddington v. Peck*, 2 Conn. 702), and is not so erroneous that it cannot be amended, is not

and cannot be void. It has been said, and we think with truth, that whether an execution is amenable is a test of whether it be void or only voidable. In *Parmlee v. Hitchcock*, 12 Wend. 97, the court said: "Whether the sheriff is bound to execute an erroneous writ delivered to him depends upon the question whether it is absolutely void or only voidable; and whether void or voidable depends upon the fact whether it is amendable."

But however difficult it may be to declare a general rule upon this subject, it is not difficult, by the light of cases, to determine whether an execution be void or voidable in a given instance. We therefore drop the further consideration of the rule, and turn to such cases as we have been able to find bearing directly upon the facts of the present case; and we have first to say that we have found no cases where it has been held that an execution, faultless in all other respects, is void because through the misapprehension or mistake of the clerk it has been made to authorize the levy of too much money; and from the fact that our search has been attended with this result, we are led to believe that if such cases exist at all they are rare, and are departures from principle.

We are unable to distinguish between the case of an *alias* execution, upon which the clerk has failed to indorse money collected upon an original execution, although it has been credited upon the judgment, and the case of an original execution which has by mistake been made to call for too much money. The result is the same, and is due to the same cause,—the result being the collection of too much money, and the cause being the mistake of the clerk; yet it has been held that such an execution is not void, and that a sale under it to a *bona fide* purchaser is valid. The same is true of executions issued upon judgments which have been already collected upon previous executions, but not so returned by the officer, or not so entered of record: *Williams v. Gill*, 6 J. J. Marsh. 487; *Luddington v. Peck*, 2 Conn. 700; *Jackson v. Cadwell*, 1 Cow. 622; *Doe v. Snyder*, 8 How. (Miss.) 66 [82 Am. Dec. 311].

But it is unnecessary to rest our conclusion upon what may be said to be only analogous cases. The precise point has been up repeatedly, and it never has been held, so far as we are advised, that a mere excess renders an execution void, or in any manner affects a sale under it to a *bona fide* purchaser.

In *Avery v. Bowman*, 40 N. H. 453 [77 Am. Dec. 728], the

judgment was for \$39.14 debt, and \$15.98 costs. These sums were stated correctly in the recitals in the execution, but the clerk made a mistake in adding them together, and accordingly the directory or mandatory part of the execution called for one dollar too much; yet it was held that neither the writ nor the levy under it was void for that reason.

In *Brace v. Shaw*, 16 B. Mon. 82, there were two judgments, one for \$1,437.33, with interest from date, and the other for \$4,329.56, with interest from date. The execution upon the first called for \$1,437.62, being twenty-nine cents too much; the other called for \$4,327.56, being two dollars less than the judgment. Neither execution called for interest. A sale of land under them to a *bona fide* purchaser was declared to be valid, for the reason that the writs were not void, but voidable only.

In *Jackson v. Walker*, 4 Wend. 462, the judgment was for \$533.17, and the execution for \$533.11, yet it was declared to be amendable, and for that reason only voidable.

In *Jackson v. Page*, 4 Wend. 588, the execution called for fifty cents too much, yet the sale under it to a *bona fide* purchaser was held to be valid.

In *Miles v. Knott*, 12 Gill & J. 442, the judgment was for \$235.83½, and the execution for \$295.83½, being \$60 too much, but it was held that the title of a *bona fide* purchaser under it was unaffected by the error. To the same effect is *Parmlee v. Hitchcock*, 12 Wend. 96; and in this connection we also refer to the following cases, where executions were allowed to be amended,—some of them being cases where the error was as to the amount,—and were held not to be void merely because they were erroneous: *Stevenson v. Castle*, 1 Chit. 349; *Jackson v. Pratt*, 10 Johns. 381; *King v. Harrison*, 15 East, 615; *Morriss v. Leake*, 8 Term Rep. 416, note a; *McCollum v. Hubbert*, 13 Ala. 284 [48 Am. Dec. 56]; *Morse v. Dewey*, 3 N. H. 535; *Smith v. Keene*, 26 Me. 420.

We regard the foregoing cases as establishing beyond a rational doubt the proposition that an execution which is amendable is not void, and that an execution which merely calls for too much money is amendable. It is true that the difference between the judgments and executions were not so great as in the present case, but no reference was made in any of them to the maxim, *De minimis non curat lex*, nor has that maxim, for obvious reasons, any application to questions of this character; it goes only to the question whether the

amount in dispute is too trifling to attract the eye of the court, and in no respect illustrates or controls a question of void or voidable process. To allow the amount of the excess — as much or little — to affect such a question is not only to invoke a principle wholly irrelevant to it, but to proclaim that, in relation to a most important matter, there is no settled rule; that if there is any variance at all, that circumstance does not establish the character of the execution as void or voidable, but its character must depend upon the varying notions of judges as to what is or is not a trifle, which is to say that the validity of judicial process is not to depend upon established rules of law, but upon judicial discretion; or in other words, the purchaser is not to be told, in round terms which he can understand, that the execution is or is not void, and that he will or will not get a title if he buys, but that if he buys he must take the chances, and wait until his title comes, as it surely will, before the judicial eye for inspection, when he will be fully informed as to what, in his case, is a trifle or is not, and that accordingly he has or has not got a title. If it be the policy of the law to uphold judicial sales, we know of no way by which that policy can be more effectually defeated than by the adoption of such a rule of decision. We say adoption, because we are certain that no such rule yet exists. The cases to which we have referred make no mention of such a rule; they all proceed upon the theory that, in respect to mere variances between the judgment and the execution, the latter is amendable, and is therefore not void, but voidable only.

That executions which are merely voidable cannot be attacked collaterally admits of no debate, where, as in this state, the common law controls the question. A collateral attack can no more be made upon an erroneous execution than upon an erroneous judgment. Like an erroneous judgment, an erroneous execution is valid until set aside upon a direct proceeding brought for that purpose; and until set aside, all acts which have been done under it are also valid. In a collateral action, it cannot be brought in question, even by a party to it, much less, as in this case, by a stranger to it. Even directly it cannot be attacked by a stranger; for it does not lie in the mouth of A to say by it B has been made to pay too much money, and that therefore all proceedings under it are null and void. That is a question which concerns B only, and if he is content, A cannot complain. Nor

if B, who is bound to know of the variance between the judgment and the execution, does not interpose by motion for its correction, ought he to be allowed to question the title of a purchaser under it, — it may be years afterward? He has a remedy by motion to amend, or by action to recover the excess of the levy from the plaintiff in the execution, and the clerk also; besides, with full knowledge of all defects, he has allowed the sheriff, acting as his agent in the matter, to sell, and the purchaser to buy, without opening his lips, and in all fairness and justice to the latter, he must keep them closed forever: *Blood v. Light*, 38 Cal. 649 [post, p. 441]; *Jackson v. Bartlett*, 8 Johns. 361; *Jackson v. Robbins*, 16 Id. 537; *Mariner v. Coon*, 16 Wis. 465; *Elliott v. Knott*, 14 Md. 121.

2. The ground upon which the second objection to the execution rests is, that it included the costs of an appeal from the judgment to this court. It was proper and regular that it should.

3. The last objection rests upon the ground that the return indorsed upon the execution does not contain a report in detail of the acts of the officer in making the levy. It was not necessary that it should. If the return be defective for the reason suggested, or for any other reason, the purchaser would not be affected by the defect. Whether the return be good or bad, sufficient or insufficient, is a matter of no moment to the purchaser; for his title depends upon it in no respect whatever.

Judgment reversed, and a new trial granted.

SPRAGUE, J., expressed no opinion.

VARIANCE BETWEEN JUDGMENT AND EXECUTION RENDERS EXECUTION VOIDABLE merely, and not void: See *McCollum v. Hubbert*, 48 Am. Dec. 56; *Sprott v. Reid*, 56 Id. 549; and the citation of the principal case in *Ellis v. Jones*, 51 Mo. 186.

EXECUTION DIRECTING LEVY OF MORE MONEY THAN JUDGMENT CALLS FOR is voidable merely: *Avery v. Bowman*, 77 Am. Dec. 728, and note.

SALE TO bona fide PURCHASER UNDER VOIDABLE EXECUTION IS VALID: *Harris v. Reynolds*, 73 Am. Dec. 600; *Bunker v. Rand*, 88 Id. 684; and the citation of the principal case in *Roush v. Fort*, 2 Mont. 485, and *Ellis v. Jones*, 51 Mo. 186. Mere want of conformity to the statutory provisions in a sale on execution will not affect its validity: *French v. Edwards*, 13 Wall. 514, citing the principal case.

PURCHASER'S TITLE AT EXECUTION SALE DOES NOT DEPEND UPON and is not affected by the return of the officer to the writ: *Phillips v. Coffey*, 63 Am. Dec. 359, and note; *Blood v. Light*, post, p. 441; and the citation of the principal case in *Hibbard v. Smith*, 67 Cal. 564.

ERRONEOUS OR VOIDABLE EXECUTION CANNOT BE COLLATERALLY ATTACKED: *Phillips v. Coffee*, 63 Am. Dec. 387; and the citations of the principal case in *Ellis v. Jones*, 51 Mo. 186; *Thompson v. North Missouri R. R. Co.*, 51 Id. 190; *Briggs v. Ewart*, 51 Id. 245; *Bray v. McOleery*, 55 Id. 140; *Newmark v. Chapman*, 53 Cal. 559.

EXECUTION WHICH IS VOIDABLE MERELY MAY BE AMENDED: *McCormick v. Wheelock*, 35 Am. Dec. 388, and note 396.

ROBERT v. ADAMS.

[88 CALIFORNIA, 288.]

STALLION IS NOT EXEMPT FROM EXECUTION WHEN KEPT FOR SERVICE OF MARES only, and not used as a work-horse.

EXEMPTION FROM EXECUTION OF OXEN, HORSES, OR MULES BELONGING TO FARMER is intended to apply to such animals only as are suitable and intended for ordinary work conducted on a farm.

ACTION to recover possession of certain horses levied upon and taken from plaintiff's possession under execution. The opinion states the facts.

Peckham and Payne, and Moore, Laine, and Silent, for the appellants.

J. A. Yoell and Andrew Craig, for the respondents.

By Court, CROCKETT, J. The only point in this appeal which we deem it necessary to discuss is whether or not, under the third subdivision of section 219 of the Practice Act, a stallion, not used as a work-horse on a farm, but kept for the service of mares, is exempt from execution.

The subdivision in question exempts from execution "the farming utensils and implements of husbandry of the judgment debtor; also two oxen, or two horses, or two mules, and their harness, four cows, one cart or wagon, and food for such oxen, horses, cows, or mules for one month." The act does not, in express terms, make this exemption applicable only to such judgment debtors as were engaged in the business of farming at the date of levy; but it is obvious that such was its intention, and we so held in *Brusie v. Griffith*, 34 Cal. 305 [91 Am. Dec. 695]. That this is the correct interpretation of the act, we entertain no doubt whatever.

Nor does the said third subdivision expressly specify that the oxen, horses, or mules must be work oxen, horses, or mules. The language is general,—“two oxen, two horses, or two mules, and their harness.” But we are satisfied, from a consideration

of the whole scope and spirit of the act exempting property from execution, that the exemption in this subdivision was intended to apply only to oxen, horses, or mules suitable and intended for the ordinary work conducted on a farm. By the first and second subdivisions, there is exempted certain household furniture, wearing apparel, and provisions for a month for the use of the family. This exemption is for the benefit of all classes of judgment debtors, whatsoever may be their vocations, because these articles are essential to all families. But the next succeeding four subdivisions were intended to exempt such articles as were used by the judgment debtor in earning a support for himself and family in his particular vocation. Hence the third subdivision exempts the farming implements of a farmer, and two horses, oxen, or mules, with their harness, four cows, and a cart or wagon, and all seed-grain or vegetables provided for the purpose of planting or sowing at any time within the ensuing six months, not exceeding in value two hundred dollars. This exemption is to enable the judgment debtor to earn a support by farming, and secures to him the means appropriate to that end. The fourth subdivision exempts the tools or implements of a mechanic or artisan, "necessary to carry on his trade"; the instruments and chest of a surgeon, physician, surveyor, or dentist, "necessary to the exercise of their profession, with their scientific and professional libraries"; the law library of an attorney, and libraries of ministers of the gospel. The fifth subdivision exempts the cabin of a miner, and his sluices, pipes, windlass, and other "appliances necessary for carrying on any kind of mining operations," including two horses, mules, or oxen, and food for the same for one month, "when necessary to be used for any whim, windlass, derrick, car, pump, or hoisting gear." The sixth subdivision exempts two oxen, horses, or mules, and their harness, and one cart or wagon, "by the use of which a cartman, huckster, peddler, teamster, or other laborer habitually earns his living."

From this summary of the act, it is entirely plain that its purpose was to secure to the judgment debtor the means to prosecute his vocation, and thus earn a support for himself and family. In securing to a farmer two oxen, horses, or mules, with their harness, a wagon or cart, his farming implements, and his seed-grain or vegetables for planting, the legislature intended, by this exemption, to enable him to prosecute his business of farming, in the ordinary sense of

that term; and the oxen, horses, or mules which are reserved to him must be such as are suitable and intended for that use. If a contrary construction of this provision were to prevail, a farmer in failing circumstances might invest his whole estate in two valuable stallions or race-horses, worth ten thousand or twenty thousand dollars each, with no intention whatever to use them for farming purposes; and by claiming them as exempt from execution, might defraud his creditors, under color of law, to a large amount. The benevolent design of the statute might thus be perverted to purposes of the grossest fraud.

Judgment affirmed.

EXEMPTION OF HORSES FROM EXECUTION: See the note to *Rockwell v. Hubbell's Adm'r*, 45 Am. Dec. 254, 255; and see *Brace v. Griffith*, 91 Am. Dec. 695, where the section of the California statute under question in the principal case is construed.

SMITH v. WALKER.

[88 CALIFORNIA, 385.]

REFEREE HAS NO POWER TO REVIEW ACTION OF COURT UPON ORDER OF REFERENCE, deciding the principles upon which an account should be taken and settled; his duty is to take the account in pursuance of the principles thus settled.

ERRORS OCCURRING IN DETERMINING PRINCIPLES UPON WHICH ACCOUNT SHOULD BE TAKEN cannot be reviewed by the appellate court, on an application for a new trial, on the ground that the referee adopted and applied those principles in the adjustment of the accounts, but can only be corrected in a direct proceeding for that purpose.

SURVIVING MEMBER OF PARTNERSHIP OWNING REAL PROPERTY IS TRUSTEE for the purpose of winding up the affairs of the firm, and must account and pay over to the administrator of the deceased partner the value and profits of the use and occupation thereof.

SURVIVING PARTNER MUST ACCOUNT AND PAY OVER TO ADMINISTRATOR OF DECEASED PARTNER all the profits of the realty and personalty of the firm which rightfully belong to the estate, although he has purchased the interest of the heirs, or the community interest of the surviving wife of the deceased partner; it is for the probate court to distribute the estate to the parties entitled.

ACTION by the administrator of Wall, against Smith, the surviving partner of the firm of Smith and Wall, for an account of profits. The opinion states the facts.

Sharpstein and Hastings, for the appellant.

Clark, Carpentier, and Leveston, for the respondent.

By Court, SAWYER, C. J. The issues in the case on the complaint and cross-complaint of defendant, Walker, were tried by the court, and the court found, among other things, that plaintiff and one John Wall were partners in the business of farming, under the firm name of Smith and Wall, until the death of the latter. "4. That at the time of the said Wall's death, said Wall and the said plaintiff were tenants in common of a tract of land in Alameda County, of 161.40 acres, and were as partners the owners of said land and a large amount of personal property. . . . 10. That the plaintiff has been in the possession, and had the exclusive use of the 161.40 acres of land mentioned in the complaint, and in the fourth finding of fact, and of all and singular the entire property, real and personal, belonging to the said copartnership of Smith and Wall, since the death of said Wall, and has taken the rents, issues, and profits thereof; that the partnership business had never been settled, nor any account rendered by the surviving partner to the legal representatives of Wall; that defendant, Walker, is the legal representative of Wall, entitled to the possession of his estate, and to have the accounting demanded of plaintiff in his cross-complaint, and the payment of such sums of money as should be found due from the plaintiff as surviving partner to the estate. It was adjudged accordingly, and referred to S. F. Reynolds to take testimony, state the account, and report to the court. In pursuance of the interlocutory judgment, the referee took testimony, stated the account, and reported the sum of \$4,890.85 due from Smith to the estate. Plaintiff moved for a new trial of the matters tried by the referee. The court found an error in one item, and required the amount of this item to be remitted by defendant, Walker, which condition being accepted, and the amount remitted, the motion was denied, and plaintiff appeals from the order denying a new trial." The first point made is, that the referee erred in charging the plaintiff, Smith, with the rents and use of the 161.40 acres of land owned by Smith and Wall, on the ground that one tenant in common is not liable to account to his co-tenant. But the court had already settled the character in which this land was held. It was not for the referee to review the action of the court. His duty was to take the account in pursuance of the principles already settled. If there was any error in these particulars, it occurred in the finding of the court, and no new trial of the issues upon the pleadings had been asked. The court, as we have seen in the fourth finding, found that the

plaintiff and Wall "were as partners owners of said land"; and in the tenth finding, that plaintiff had been "in the possession and had the exclusive use of the 161.40 acres of land mentioned in complaint, and the fourth finding of fact, and all and singular, the entire property, real and personal, belonging to the said copartnership of Smith and Wall, since the death of said Wall, and has taken the rents, issues, and profits thereof." This settled the facts on this point for the purposes of the accounting, and there was nothing left for the referee but to ascertain what the value of the "rents and use" was. Under this finding, the plaintiff stood in the same relation to the realty that he did to the personalty of the firm. He was something more than a mere tenant in common as to both. He was in possession of the whole property of the firm, real and personal, as partnership property, by virtue of his right as surviving partner under section 198 of the Probate Act. He was a trustee for the purposes of winding up the affairs of the firm, and accountable for the profits of the realty, as well as the personalty, or the value of the use and occupation.

It does not fall within the principle of the cases cited with reference to mere tenancies in common. Besides, no question was made upon the correctness of the findings of the court. No new trial was moved for, or question raised, as to the second point. There is no inconsistency between the finding of the court and referee. The court held the action of Mrs. Cochran "utterly null and void," so far as it assumed to affect "heirs and creditors" only. But so far as there was a contract between the plaintiff and Mrs. Cochran, affecting her own individual rights, we see no reason why it is not valid. And so far as the conveyance is concerned, such was the character of the contract. Upon an examination of all the papers executed by the parties plaintiff and Cochran and wife, at that time, it is evident that both Mrs. Cochran and plaintiff only supposed that she had conveyed her own individual interest in the property. She nowhere purports to contract as administratrix. She contracts in her individual character only. In the contract designated "Exhibit A," she contracts individually, and not as administratrix. So, also, in contract designated "Exhibit C," where she recites that she had granted, bargained, and sold "all the right, title, and interest of said Lucy H. Cochran, as the surviving widow of John Wall, deceased, in and to certain lands and premises, consisting of 161.40 acres of land," etc., not as administratrix.

The property was common property, and she had an individual, personal interest in the land as widow, which is here appropriately described for the purpose of designating that interest. There is nothing in this instrument indicating an intention to contract in any other character. The deed of conveyance, exhibit L, purports only to be the personal contract of Mrs. Cochran, not a contract in the character of administratrix, although it purports to convey the land without stating her interest in it, as is often the case in conveyances where parties do not own the whole. But this is the instrument referred to in exhibit C, which was executed at the same time, and as a part of the same act, where she recites it as conveying her interest as surviving widow. So, also, plaintiff understood that its effect was to convey her personal interest only; for, in the instrument designated "Exhibit B," executed by himself as a part of the same transaction, and in which he agrees to pay the Borel note of four thousand dollars, in consideration of the conveyance, he recites: "Whereas, said Lucy H. Cochran . . . has this day conveyed her separate interest and estate in and to certain lands and premises in said Alameda County, containing 161.40 acres," etc. So exhibit C, also a part of the same transaction, recites that the infant children of John Wall, deceased, have an interest in the land, and the instrument itself is a bond in the penal sum of two thousand dollars, executed by Mrs. Cochran and her husband, by which they obligate themselves to said plaintiff to take certain proceedings in the probate court by which he would be able to acquire the interests of said minor children. Thus it was contemplated by both parties that the conveyance from Mrs. Cochran and her husband only passed her individual, separate interest, and that other proceedings should be taken by means of which the interest of the infant heirs, in whom the remaining interest was vested, should be acquired. Plaintiff obtained the entire consideration for his contract. It was the conveyance of Mrs. Cochran's interest, and the bond of two thousand dollars to secure her efforts to procure the interest of the minor heirs. The bond he received, and this personal obligation he relied on. He had no idea that he had procured the title of the infant heirs. If he fails to get the title of the heirs, he has the remedy for which he stipulated, — his bond. He has, therefore, got his consideration for the payments which he agreed to make in this instrument, including the Borel note

of four thousand dollars, and he was not entitled to have it allowed again by the referee, in the settlement of his partnership accounts. The referee, therefore, properly refused to allow it.

There can be no doubt, from the testimony, that there were in the hands of plaintiff Smith 4,362 sacks of wheat belonging to the firm, produced from some source; for in the account of Ellerhorst & Co. with Wall and Smith, the firm is credited with that number of sacks between September 5 and December 30, 1862. This account was put in evidence by plaintiff himself. It can make no difference whether it was all the product of the harvest of the summer of 1862, or part of that harvest and a part of the product of prior years. There was so much wheat credited to the firm account at that time by the commission merchants of the firm who sold the wheat for them. We need not look for further testimony, then, to support this part of the finding of the referee. It is claimed that the value of this wheat should not be charged to plaintiff, because the account of Ellerhorst & Co. is with the firm, and not with him. But he represented the firm as surviving partner. There was no other at the time in the firm. It is claimed that only the item in the account of Ellerhorst & Co. charged as "cash," without explanation, should be charged to plaintiff, because Teitman testified that "the charge of cash in this account was paid to Smith; this is so in all accounts, unless otherwise explained therein"; and it seems to be argued that the other items, such as "cash, Captain Roberts," "cash to Myers," "cash for sacks," etc., must be taken as paid on firm indebtedness, and therefore as not going to plaintiff. But these payments could only be made by the authority and direction of plaintiff, the surviving partner. Ellerhorst & Co. could only know that they went to firm uses, because so stated by plaintiff. It was for him to show that they, in fact, did pertain to the business of the firm. It must have been under his direction and supervision that the payments were made. They could be made under no other authority, and it was for him to show the application. The account simply shows the amount of grain, the price at which it was sold, and that the money was paid out in some way under the direction of the representative of the firm, and the account between the firm and Ellerhorst & Co. balanced. And plaintiff, as surviving partner, was the only representative of the firm. The referee has found that, in addition to

sums paid on promissory notes, particularly specified in the finding, plaintiff paid out on debts and just claims against the partnership to different creditors, and at different times, the sum of \$6,185.42. He does not inform us of the items that go to make up this aggregate, or the exact process by which he attained this result, and we are unable, from the record, to exactly trace it. But aside from this account of Ellerhorst & Co., the evidence is loose, and the referee might have rejected some and allowed other items not embraced in this account, and we are unable to determine which were allowed and which rejected. The account of Ellerhorst & Co. seems, however, to have been balanced on April 10, 1862, a short time before Wall's death. From that time on, deducting the items designated "cash" unexplained, which appellants admits should be charged against plaintiff, it will be found that the referee has credited the plaintiff enough to cover all the balance of the items of that account, and some thousands over applicable to other matters. We have no doubt plaintiff was credited with all those items in that account. We are unable to see from the record that the referee has not credited plaintiff with every item paid or expended on behalf of the firm. It would be impossible for us to state the account anew from the record without having heard the witnesses testify.

As to the fifth point, the judgment for one half of the net proceeds in favor of the administrator is correct. He represents the entire estate. When recovered, the probate court, after paying the expenses of administration and the debts of the estate, if any there are, will distribute the estate to the parties entitled. If plaintiff has acquired Mrs. Cochran's interest in the property, by virtue of the contract with her, as respondent concedes that he has, it will doubtless be distributed to him upon a proper showing, under the direction of the probate court, when the amount of that interest is finally ascertained. Till then, the administrator is entitled to the possession and control of the entire estate. Till he recovers the whole estate, the amount to be distributed cannot be known.

Although, from the loose manner in which the evidence is presented in the record, the exact amount which should be credited to plaintiff as paid on partnership account does not very clearly appear otherwise than by the findings of the ref-

eree, we find nothing to justify us in disturbing the account as stated by him.

Judgment and order affirmed.

POWERS AND DUTIES OF REFEREE: See *Underwood v. McDuffie*, 93 Am. Dec. 194, and cases cited in the note.

SURVIVING PARTNER'S RIGHTS AND DUTIES CONCERNING PARTNERSHIP PROPERTY: See the extended note to *Stields v. Fuller*, 65 Am. Dec. 295, and *Brown v. McFarland*, 80 Id. 598.

RUSSELL v. HARRIS.

[88 CALIFORNIA, 426.]

AS AGAINST MERE TRESPASSER, STRICT PROOF OF ISSUANCE OF EXECUTION is not required to be made by a purchaser at sheriff's sale who has been in possession for a long period of time claiming title under the deed, and especially where neither the defendant in the judgment, nor any one claiming under him, has made any claim adverse to the plaintiff. And when it is shown that there was a judgment of a proper date, upon which an execution might have issued, a charge by the clerk for issuing an execution, a sale by the sheriff, and a certificate of sale purporting to have been made in pursuance of an execution, and that after the expiration of six months from the sale the sheriff executed a deed in which the judgment and execution are recited, — these facts are sufficient to raise the presumption of the existence of an execution after the lapse of sixteen years, although none could be found among the records of the court.

POSSESSION OF ONE ENTERING UPON PORTION OF TRACT OF LAND, claiming the whole under a deed, no other party being in the adverse possession of any part of it, extends to the bounds of the deed.

EJECTMENT. The opinion states the facts.

George Cadwallader, for the appellant.

Beatty and Denson, for the respondent.

By Court, SAWYER, C. J. Although the evidence that an execution issued on the judgment under which the sale was made is very slight, we are not quite sure that the court would not have been justified in finding that one did issue. There was a judgment of the proper date upon which one might have issued. There was also a charge in the fee-book kept by the clerk for issuing an execution. The date of the charge is not given, but it is between other dates that would admit of the execution being issued at a time corresponding with the date of the execution recited in the sheriff's deed. There was a sale and certificate of sale, purporting to have been made in pursuance of an execution; and after the expiration of six

months from the sale, the sheriff executed a deed in due form, in which the judgment and execution are regularly recited, the execution recited as having been issued at about the time we should expect one to issue. No execution, however, could be found among the records of the court. But the sale was some sixteen years ago, when the records were very loosely kept; and it is notorious that many papers in our various courts, filed at that day, have been lost. The purchaser—the plaintiff in this case—was in possession of the purchased premises several years, claiming title under his deed; and it does not appear that the defendant in the judgment, or any one claiming under him, has ever made any claim adverse to the plaintiff. This action is against a naked trespasser. Under such circumstances, the court would be justified in not requiring the very strictest proof of the issuing of the execution. It ought to be enough to satisfy the mind, it is true. The plaintiff, doubtless, might have made more strenuous efforts to supply evidence on this point, and there seems to have been some remissness in this particular. But whatever the facts may be with respect to this point, we think the court erred in its conclusions that the facts shown by the evidence, and found, did not show a prior possession in the plaintiff. The sheriff's deed is regular upon its face, and describes the land conveyed by metes and bounds with sufficient precision. The plaintiff, for some years, lived upon and occupied a part of the land, claiming the whole, while there was no other party in adverse possession of the part in controversy. We think this extended his possession to the bounds of his deed within the case of *Hicks v. Coleman*, 25 Cal. 132-135 et seq. [85 Am. Dec. 103]:

Judgment and order denying a new trial reversed, and new trial granted.

RHODES, J., expressed no opinion.

ACTUAL OCCUPANCY OF PART OF TRACT AMOUNTS TO POSSESSION OF WHOLE: See *Hicks v. Coleman*, 85 Am. Dec. 104, and note 124.

THE PRINCIPAL CASE WAS CONSIDERED IN A SECOND APPEAL, and the principles laid down reaffirmed: 44 Cal, 498.

GRAIN v. ALDRICH.

[33 CALIFORNIA, 514.]

ASSIGNMENT OF PART OF ENTIRE DEMAND, UNLESS WITH CONSENT OF DEBTOR, is void at law, but in equity the rule is otherwise.

AVERMENT OF CONSENT OF DEBTOR TO ASSIGNMENT OF PART OF DEMAND was necessary at common law to enable the creditor to recover; but under the California Code, which follows the equitable doctrine, a complaint is not demurrable, for lack of facts, if it fails to contain such averment.

ASSIGNEE OF PART OF ENTIRE DEMAND MAY, IN CALIFORNIA, RECOVER IN HIS OWN NAME, without making the holders of the remainder of demand parties, if the debtor consented to the assignment; but if he did not consent, the complaint will be bad on demurrer for want of parties, unless the other holders are joined.

COMPLAINT STATING FACTS ENTITLING PLAINTIFF TO ANY RELIEF, either at law or in equity, is not demurrable for want of facts.

AVERMENT IN COMPLAINT IN ACTION UPON ASSIGNMENT OF PART OF ENTIRE DEMAND in the following words, "of which said assignment defendants have had due notice," is not an allegation that the defendants knew of or assented to the assignment at the time it was made.

OBJECTION TO COMPLAINT FOR WANT OF PARTIES IS WAIVED, if not taken advantage of by demurrer on that ground, though sought to be reached by a demurrer for want of facts sufficient to constitute a cause of action.

OMISSION TO DEMUR FOR WANT OF PARTIES DOES NOT AFFECT POWER OF COURT, under section 17 of the California Practice Act, to direct other parties to be brought in, if it finds it impossible to completely determine the controversy without them.

ACTION upon an assigned claim for part of an entire demand. The opinion states the facts.

Wilson and Crittenden, and W. H. L. Barnes, for the respondents.

H. and C. McAllister, and Henry E. Highton, for the appellants.

By Court, SANDERSON, J. The plaintiffs, as agents for the Bank of British North America, sue to recover of the defendants, formerly engaged in business in Honolulu, under the name of Aldrich, Walker, & Co., the aggregate sum of \$132,236.25.

The complaint contains three counts, in each of which the same claim is stated in different modes. The facts, however, are, that the defendants were indebted to the firm of Charles W. Brooks & Co. in the sum of \$159,000, and upwards; that Brooks & Co. sold and assigned a part of said indebtedness, to wit, the sum of \$44,078, to the plaintiffs, of which assignment the defendants had due notice.

To this complaint, the defendants demur, upon the ground that it does not state facts sufficient to constitute a cause of action. The court below sustained the demurrer, and plaintiffs having declined to amend, final judgment passed for the defendants. Being dissatisfied with this result, the plaintiffs have brought the case here.

In support of the demurrer, it is argued on the part of the defendants that an assignment of a part only of an entire demand is void at law, unless made with the consent or ratification of the debtor; that is to say, that no action at law can be maintained upon such an assignment, unless it was made with the express consent of the debtor, or was subsequently duly ratified by him; and that this is an action at law, and there is no allegation that the assignment was made with the knowledge and consent of the debtors, or that they subsequently ratified it.

Leaving out of view the practice which has been adopted in this state, and which has abolished in the matter of procedure and form all distinctions between law and equity, the position taken by the defendants is doubtless impregnable. Indeed, the proposition is so well settled that it need only be stated. "At law, the debtor has a right to stand upon his contract," said Mr. Justice Story, in *Mandeville v. Welch*, 5 Wheat. 277. To allow the creditor to split an entire claim into any number of fragments he may choose would subject the debtor to conditions to which he never assented, and involve him in embarrassments and responsibilities which he never contemplated. It has always been considered that a plaintiff having an entire demand cannot divide it into distinct parts and maintain separate actions upon each. If he undertakes such a course, a recovery in one action will bar the others: *Smith v. Jones*, 15 Johns. 229; *Willard v. Sperry*, 16 Id. 121; *Marziou v. Pioche*, 8 Cal. 536; *Herriter v. Porter*, 23 Id. 385. If he cannot do this himself, by parity of reason he cannot by an assignment enable others to do it, either in his name, as at common law, or, under the rule in this state, in their own. This question, substantially, was before us in a recent case, involving the question whether part of an entire demand, so assigned, could be attached in the hands of the debtor at the hands of a creditor of the assignee. We considered that it could not, for the reason that only the legal demands of the defendant in an attachment could be reached by garnishment; that is to say, only such demands as the defendant in the attachment could have

recovered in an action at law under the practice at common law, and that by the assignment in question, the defendant in that case had acquired, if anything, only a lien in equity upon the fund, which the plaintiff undertook to reach by his attachment: *Hassie v. God Is With Us Congregation*, 35 Id. 378.

The claim put forward by the plaintiffs, that the assent of the defendants to the assignment is alleged in the complaint, is without any substantial foundation. The allegation is, "of which said assignment the defendants have had due notice." This is not an allegation that the defendants knew of the assignment at the time it was made, and assented to it, or that they afterward did so. It is merely an allegation of the notice which an assignee of such a demand as that declared on is required to give in order to stop payment to his assignor, and thus secure to himself the subject of the assignment.

In view of what has been said, we must agree with counsel for defendants that, had the plaintiffs gone, under the English practice, into a court of law upon the facts stated in their complaint, they could not have been allowed to recover. And if they could not have amended their complaint so as to show an express assent to the assignment by the defendants, they would have been finally told they were in the wrong forum. But under the system of practice which prevails in this state, such results do not follow. Legal and equitable relief are administered in the same forum, and according to the same general plan. A party cannot be sent out of court merely because his facts do not entitle him to relief at law, or merely because he is not entitled to relief in equity, as the case may be. He can be sent out of court only when, upon his facts, he is entitled to no relief, either at law or in equity. If, then, upon the facts stated in the complaint, the plaintiffs would have been entitled to relief in equity under the old system of practice, the ruling of the court below was erroneous.

Here, too, we agree with counsel for the defendants that, under the English practice, a court of equity would not grant the plaintiffs relief, as the case now stands; not, however, upon the ground that the facts do not entitle him to it, but because all of the parties interested in the subject-matter are not before the court. There can be no question but that equity will sustain this assignment, and take an account of the indebtedness between Brooks & Co. and the defendants, and settle and ascertain the respective interests of Brooks & Co. and plaintiffs in the funds, and render judgment accord-

ingly. This is not denied by counsel for the defendants. Indeed, that equity will do this, is quite as well settled as it is that law will not: *Field v. Mayor of New York*, 6 N. Y. 179 [57 Am. Dec. 435]; *Pope v. Huth*, 14 Cal. 407; *Pierce v. Robinson*, 13 Id. 120. Had the plaintiffs made Brooks & Co. parties, and added a prayer for an account and apportionment of the debt due from the defendants, there could have been no question as to their right to relief. Under our system of practice, then, the real objection in this case is not a want of facts, but a want of parties. The defendants are entitled, if they so desire, to have all the parties having an interest in the subject-matter before the court, in order that its judgment shall be a final determination of the whole matter, and leave nothing to be done by piece-meal. But our system makes no distinction between law and equity cases, and if the defendants were unwilling that this case should proceed by piece-meal, or without the presence of Brooks & Co., they should have put their demurrer upon that ground. Having demurred only upon the ground that the facts are insufficient, their demurrer should have been overruled, for the statute expressly provides that if no objection be taken for the want of parties, the objection shall be deemed waived. The defendants were at liberty to waive the objection, if they saw proper to do so. This they did, by not taking the objection in the appointed mode.

In conclusion, it is proper to say that if, in the course of the subsequent proceedings in this case, the court should find it impossible to completely determine the controversy between these parties, without the presence of other parties, the court may order them to be brought in, notwithstanding the failure of the defendants to insist by demurrer upon their presence: Practice Act, sec. 17.

Judgment reversed, and cause remanded.

COMPLAINT STATING FACTS ENTITLING PLAINTIFF TO ANY RELIEF is not bad for want of facts: *Morse v. Swan*, 2 Mont. 309, citing the principal case.

ASSIGNMENT OF PART OF DEMAND, ENFORCEABLE WHEN: See *Field v. Mayor of New York*, 57 Am. Dec. 435, and cases cited in note.

PRINCE v. LYNCH.

[35 CALIFORNIA, 528.]

COURT CANNOT RE-EXAMINE EVIDENCE AND SUBSTITUTE DIFFERENT FINDINGS OF FACT after trial and rendition of judgment and filing of findings. **SUFFICIENCY OF EVIDENCE TO JUSTIFY ITS FINDINGS CAN BE REVIEWED** in court which found the facts only upon motion for new trial.

RELEASE, BY CREDITOR OF CORPORATION, OF STOCKHOLDER'S LIABILITY FOR DEBT, by an instrument under seal, discharges the corporation and the other stockholders, to the same extent as the one to whom the release is executed is discharged. Thus if the release be of the releasee's proportion of the indebtedness of the corporation, the corporation and other stockholders are only released *pro tanto*.

RELEASE OF STOCKHOLDER FROM LIABILITY FOR DEBT BY CREDITOR OF CORPORATION is sufficient, in California, to support the plea of payment by another stockholder, in an action against him for his proportion of the debts of the corporation.

ACTION against a stockholder for his proportion of the debts of the corporation, by a creditor thereof. For a defense and counterclaim, the defendant alleged that the creditors had released him from his proportion of the debts of the corporation. The remaining facts appear in the opinion.

F. P. Dann, for the appellant.

N. B. Mulville, for the respondent.

By Court, SAWYER, C. J. This cause was tried by the court without a jury, on the 24th of October, 1868; and on the 7th of November following the court filed its findings in writing, stating the facts found and conclusions of law separately, as required by the practice act, and concluding with a direction to enter judgment for the defendant in pursuance of the findings. The plaintiff having given the defendant notice on the 10th of November of the filing of said findings, on the 14th of November the defendant gave plaintiff notice that he excepted to the findings, on the ground that they were not in accordance with the evidence introduced, and served therewith other and different findings, which he claimed to be in accordance with the evidence, and a notice that on the 21st of November he would move the court to substitute the findings so served for those on file. On hearing the motion, the court made the substitution, with some slight modification, to all of which the plaintiff excepted, and he now relies on this action of the court as one of the grounds for reversing the judgment and order denying a new trial. The change, however, was in

some minor particulars, and the conclusion of law and judgment are the same as they were upon the finding first filed.

We know of no provision of the practice act authorizing the court to re-examine the evidence upon the motion of one of the parties, after it has once filed its findings and rendered judgment, and on such re-examination to reverse its former action and substitute different findings of fact. Under the act of 1861, and section 180 of the Practice Act, as amended in 1866, the court is authorized to supply omissions and defects. We have often stated the object and scope of these provisions: *Hidden v. Jordan*, 28 Cal. 304, 305; *Miller v. Steen*, 30 Id. 408 [89 Am. Dec. 124]; *Cowing v. Rogers*, 34 Id. 648; *Rice v. Inskip*, 34 Id. 224. But these provisions do not authorize a re-examination of the evidence for the purpose of correcting former errors, and changing the finding of facts. The mode provided for reviewing its former action by the same court, as to the sufficiency of the evidence to justify the finding, is by motion for new trial. On the motion for new trial, when the judge is of opinion that the damages are excessive under the evidence, he may require a portion to be remitted, as a condition of denying a new trial, and in this way, if submitted to, correct the error. Perhaps there may be other errors which could readily be corrected in this way. But if there is an error of fact affecting the judgment, which cannot be obviated in this mode, we know of but one regular way to correct it, and that is by motion for new trial: *Carpentier v. Gardiner*, 29 Cal. 163; see also *Calderwood v. Pyser*, 31 Id. 337.

If the judge should discover a clerical mistake in his findings, or that he had inadvertently committed an error, and should correct it at the same term, before the entry of judgment, while the proceeding is still *in fieri*, and in such a manner that the party against whom the correction is made shall not thereafter lose an opportunity to move for a new trial, or have the time within which to move in any way abridged, or lose any other right thereby, we doubtless should not grant a new trial on that ground. But the practice of entertaining a motion to review the action of the court in the mode pursued in this instance, if adopted, would be liable to abuse. It is nowhere recognized by the practice act, and ought not to be encouraged. A much better practice would be to submit the finding for the suggestions of the attorneys of the respective party, before signing and filing: *Tewksbury v. Magraff*, 33 Cal. 237, 255.

A release under seal of one of several joint or joint and several debtors or obligors is a release as to all: *Armstrong v. Hayward*, 6 Cal. 185, 186; *Rowley v. Stoddard*, 7 Johns. 210; *Cheatham v. Ward*, 1 Bos. & P. 633; *Nicholson v. Revill*, 4 Ad. & E. 683; *American Bank v. Doolittle*, 14 Pick. 126; *Tuckerman v. Newhall*, 17 Mass. 583; *Goodnow v. Smith*, 18 Pick. 415 [29 Am. Dec. 600]. A release extinguishes the obligation: *McCrea v. Purmort*, 16 Wend. 474 [30 Am. Dec. 103.]

Both defendant Lynch, to the extent of his personal liability as a stockholder of the corporation, and the corporation, the Gobernadora Silver Mining Company, were jointly and severally liable to McClelland and Atkinson for their respective debts due from the corporation to them. If not jointly liable in the strict sense of that term, as has been suggested, the legal incidents, as between the corporation and stockholders, to the extent of their personal liability, are, it seems to us, precisely the same. The stockholder is not a surety in any sense of the term. He is under the constitution and the statute primarily liable in the same sense as the corporation is primarily liable. The same identical act which casts the liability on the corporation also casts it on the stockholder. There are not separate contracts. The stockholder does not stand in the position of an indorser or guarantor. An indorser or guarantor is not liable on the same contract. His contract is a separate and distinct one of his own, to which the principal is no party. It is founded upon the principal contract, and finds its consideration only in that contract; but it is a separate and distinct contract nevertheless, and the terms are different. Each is liable on his own particular contract, but there is no joint contract or joint obligation. The maker and indorser or guarantor of a note may be sued jointly, it is true, but this does not result from the fact that there is a single joint contract.

It is suggested that the reason the release of one joint obligor discharges the other is, that if either pays the debt the other is liable to contribution, which would be defeated by the release if it were permitted to exonerate only the party to whom it is made. On this ground it is said to be held to extinguish the debt. Now, this incident attends the relation in question, and this principle is as applicable to it as to the case of two joint makers of a note.

Suppose the corporation is sued and a recovery had; the stockholder released must contribute his share, for the corporation can levy an assessment on all the stockholders, according

to their respective shares, to raise funds to pay the judgment. The corporation must pay it, unless it, too, is discharged, and the other share-holders are entitled to have him contribute his share. Or, suppose the corporation is in funds, and pays without an assessment, it takes from the stockholder released his *pro rata* share of a fund which would otherwise go to him in dividends, and thus he is made to contribute notwithstanding his release. So suppose McClelland had sued other stockholders of the corporation, and recovered and collected from them the whole amount of his debt; the stockholder or stockholders so compelled to pay would have a claim for contribution against Lynch for his share, and thus either the right to contribution of the share-holder who has been compelled to pay or the release to Lynch must be defeated. Suppose, again, that McClelland should discharge all the stockholders from personal liability, as has been suggested, and the corporation itself should still remain liable, each stockholder would still be liable to contribute his *pro rata* share, either in the form of an assessment levied by the corporation to pay the debt, or by a diminution of dividends, and the release would be defeated, or the corporation deprived of power to protect its property. One of two results must inevitably be reached. Either the debt is extinguished as to all by the release, or the release is wholly inoperative as to all. Thus the incidents and consequences are the same as between joint debtors and joint obligors in any other form.

We think, therefore, that the case is within the rule, and that a valid release, under seal, discharges the corporation and other stockholders, as well as the stockholder released. The releases to the defendant, Lynch, referred to in the findings, were in due form and under seal, and we think to the extent of the amount released, discharged the corporation as well as Lynch. But we think the court erred in holding that the whole \$416.66, due McClelland, was released. The language of the release is: "I hereby release and discharge said Francis Lynch from his proportion of said company's said indebtedness to me." The release, by its express terms, then, is only "from his proportion of said company's said indebtedness to me,"—not from the whole; "and this shall be said Lynch's receipt in full to date for his proportion and share of all indebtedness to me by said company, and a bar to any and all suits against said Lynch for the same"; that is to say, for "his proportion and share." It is manifest that McClelland did not intend to re-

lease his whole demand, but only Lynch's share. Although Lynch might be liable under the act to pay McClelland the whole demand against the company, as held in *Larrabee v. Baldwin*, 35 Cal. 155, if the amount of the aggregate debts of the corporation upon which he was personally responsible was sufficient; yet the whole would not be his share of the indebtedness, because he would be entitled to recover the excess paid by him over his share from the corporation, and to call upon his co-stockholders, who were also personally liable, to contribute. The fact that he might be liable personally, under the statute, in the first instance, to pay the whole to the creditor, does not increase or diminish, or in any way affect, the amount of his share of the demand. His share of the \$416.66 is that sum which bears the same ratio to \$4,418 that the amount of the capital stock held by defendant bears to the whole capital stock, and that is the sum released.

We think, however, that the court was right in regarding the amount thus released as a payment by the defendant of other liabilities of the corporation with which he is entitled to be credited under section 16 of the act under which the corporation was organized. The release was to defendant, and it operated as a satisfaction of so much of the indebtedness of the corporation procured by defendant. It is quite manifest that McClelland intended that defendant, not the corporation, should have the benefit of the release. If he chose to make a gift of this sum to the defendant, he had a right to do so; and, upon the gift being made, the amount became the property of defendant, and not of the corporation or other creditors of the corporation, and operated as a satisfaction by defendant. Defendant stands precisely in the same position as he would if McClelland had made him a present of so much money, and he had immediately paid the amount back to McClelland in satisfaction of an equal amount of the indebtedness of the company upon which defendant was personally liable. Not to allow the amount released to defendant as a payment by him of so much indebtedness of the company would be to take from defendant that which McClelland had given him for his own personal benefit, and give it to the corporation, or to other creditors of the corporation. We think, therefore, that the amount released by McClelland and Atkinson should be credited to defendant as a payment, and deducted from that portion of the corporate debts for which he is personally liable, and that judgment should not be rendered against him for an

amount exceeding the balance of the portion of the corporate debts for which he is personally liable remaining after such deduction.

We do not see that there is any necessity for a new trial. The only issue upon the pleadings is as to the amount of the indebtedness of the corporation upon which defendant is personally liable. Upon this point both findings substantially agree as to the facts upon which the question is to be determined. The rest is mere matter of calculation, when the legal principles arising upon the facts are settled. Upon the pleadings and both findings, the amount of the debts of the corporation, for a portion of which defendant is liable, on the 26th of April, 1867, was \$4,418; and the amount to be credited as a payment on the debts of the corporation is the share of the defendant of the debt of \$416.66 to McClelland, and \$207 to Atkinson, released. The proportions and interest are mere matters of calculation.

The judgment is reversed, and the district court directed to compute the amount and enter judgment upon the pleadings and undisputed findings, in pursuance of the principles stated in this opinion.

RHODES, J., dissented.

CROCKETT, J., filed a separate opinion, dissenting from the opinion of a majority of the court on the more important question involved, whether, "if a creditor of a corporation release one of the stockholders from his individual liability for the debt, he thereby discharges the corporation and the other stockholders." And he maintains, as the law of the case, "that as between themselves, the corporation is the principal debtor, and the stockholders are but sureties or guarantors; that though both are primarily liable to creditors in the same manner that the maker and indorser of a promissory note are primarily liable, yet, as between themselves, the corporation being the principal debtor, and the stockholders only its sureties, a release of the corporation will release the stockholders; but a release of the latter will not discharge the former, for precisely the same reason that a release of the indorser does not discharge the maker of a promissory note." He concludes, as resulting from this view of the law, "that a release to a stockholder of his individual liability for his proportion of a debt due to a particular creditor does not *pro tanto* discharge the corporation"; but expresses no opinion on the point "whether a release of one or more stockholders from their individual liability releases *pro tanto* the other stockholders from their liability as such."

NATURE OF STOCKHOLDER'S LIABILITY FOR DEBT OF CORPORATION. — The individual liability of stockholders of a corporation for the corporate debts is a subject which has already been treated at some length in a note to *Freeland v. McCullough*, 43 Am. Dec. 694-703. The cases bearing on the subject are again collected in a note to *Corning v. McCullough*, 49 Id. 308. See also, as

bearing on different branches of the subject, *Coffin v. Rich*, 71 Id. 559; *Commercial Bank v. Steam Factory*, 75 Id. 658. Under the present title, it is merely proposed to collect the more recent decisions of the courts having reference to the nature of such liability.

The individual liability of stockholders in a corporation for the payment of its debts does not exist at common law. It is always a creature of statute, and can be enforced only as therein provided: *Pollard v. Bailey*, 20 Wall. 520; *Fourth Nat. Bank v. Frenchlyn*, 120 U. S. 747; *Knower v. Haines*, 31 Fed. Rep. 513 (Vt.). According to the prevailing view, statutes which impose the liability are to be strictly construed: *Appeal of Means*, 85 Pa. St. 78; *O'Reilly v. Bard*, 105 Id. 569; *Priest v. Essex Hat Mfg. Co.*, 115 Mass. 360; *Salt Lake City Nat. Bank v. Hendrickson*, 40 N. J. L. 52; *Bassett v. St. Albans Hotel Co.*, 47 Vt. 313; being in derogation of the common law, they cannot be extended beyond their literal terms: *Chase v. Lord*, 77 N. Y. 1. But the rule of strict construction is not to be applied where the intent is manifest from the words of the law: *Mayer v. Penn. State Co.*, 71 Pa. St. 293; and see *Bolin v. Brown*, 33 Mich. 257.

The usual statutory liability imposed upon stockholders for the corporate debts is not regarded by the courts as in the nature of a forfeiture or penalty, but as virtually and in effect a liability on a contract, and the mutual agreement of the parties: *Norris v. Wrenschall*, 34 Md. 492; *Sullivan v. Sullivan Mfg. Co.*, 14 S. C. 494; *Blakeman v. Benton*, 9 Mo. App. 107; *Queenan v. Palmer*, 117 Ill. 619; *Woods v. Wicks*, 7 Lea, 40; *Brown v. Hitchcock*, 36 Ohio St. 678; *Hawkins v. Furnace Co.*, 40 Id. 507; *Flash v. Conn.*, 109 U. S. 371; *Carrol v. Green*, 92 Id. 509; the liability arises out of the implied promise of the stockholder to assume and discharge the individual liability imposed by the statute under which the corporation was created: *Nimick v. Iron Works*, 25 W. Va. 184; *Hodgson v. Cheever*, 8 Mo. App. 321; *Manville v. Edgar*, 8 Id. 324. And where the liability is regarded as in the nature of contract, it will be enforced in the courts of a state other than that in which it was created: *Woods v. Wicks*, 7 Lea, 40; *Aultman's Appeal*, 98 Pa. St. 505; *Flash v. Conn.*, 109 U. S. 371; and see *Chase v. Curtis*, 113 Id. 452; *Jessup v. Carnegie*, 80 N. Y. 441; unless the statute imposing the liability also prescribes a peculiar remedy for its enforcement, which cannot be made available in another state: *Christensen v. Eno*, 106 N. Y. 97; *Nimick v. Iron Works*, 25 W. Va. 184; and see *Rice v. Hosiery Co.*, 56 N. H. 114; *Knower v. Haines*, 31 Fed. Rep. 513; *Patterson v. Lynde*, 112 Ill. 196; S. C., 106 U. S. 519; only the remedy given by the statute creating the liability, if the statute gives a remedy, is available, whether the proceedings are taken in the state creating the corporation or elsewhere, and whether in state or federal courts: *Fourth Nat. Bank v. Frenchlyn*, 120 Id. 747. And if the liability is penal in its nature, as where it is imposed upon the corporate authorities for doing that which the statute expressly or by implication forbids, or for the omission to do something which the law directs to be done, it will not be enforced outside of the state creating it: *Woods v. Wicks*, 7 Lea, 40; *Derrickson v. Smith*, 27 N. J. L. 166; *Meler v. Sprague*, 9 R. I. 541; *Sturges v. Burton*, 8 Ohio St. 215; and see *Chase v. Curtis*, 113 U. S. 452; *Gridley v. Barnes*, 103 Ill. 211.

The statutory liability of stockholders is created for the exclusive benefit of the creditors of the corporation, over which the corporate authorities have no control: *Wright v. McCormack*, 17 Ohio St. 86; *Unmated v. Buakirk*, 17 Id. 113; and the liability is to be enforced by the creditors in their own right, and for their own especial benefit, by appropriate legal proceedings taken for

that purpose: *Farnsworth v. Wood*, 91 N. Y. 308; *Mason v. New York Silk Mfg. Co.*, 27 Hun, 307; *Billings v. Trask*, 30 Id. 314. The liability does not exist in favor of the corporation itself. Hence a receiver of "all the estate, property, and equitable interests" of an insolvent corporation cannot enforce the liability: *Jacobson v. Allen*, 20 Blatchf. 525; *Arens v. Weir*, 89 Ill. 25; *Farnsworth v. Wood*, 91 N. Y. 308.

The statutory liability imposed upon stockholders is not generally regarded by the courts as a primary resource or fund for the payment of the corporate debts. And the general rule is, that a creditor must first exhaust his remedy against the corporation before he can proceed against a stockholder upon his individual liability: See *Bush v. Cartwright*, 7 Or. 329; *Appeal of Means*, 85 Pa. St. 75; *Wright v. McCormack*, 17 Ohio St. 95; *Jacobson v. Allen*, 20 Blatchf. 525. There must be a judgment recovered against the corporation, and execution returned unsatisfied: *Brown v. Eastern Slate Co.*, 134 Mass. 590; *Wheeler v. Millar*, 24 Hun, 541; S. C., 90 N. Y. 353; *Handy v. Draper*, 89 Id. 334; and see *Viele v. Wells*, 9 Abb. N. C. 277; *Cleveland v. Burnham*, 64 Wis. 347; though the fact that the corporation had been adjudged bankrupt was held to be a sufficient excuse for not proceeding against it, before suing a stockholder, under the New York statute: *Shellington v. Howland*, 53 N. Y. 371; S. C., 67 Barb. 14; and see *Flash v. Conn*, 109 U. S. 371. But liability under the Rhode Island statute cannot be enforced by action at law against the stockholder or his executor, without previously recovering judgment against the corporation, although the corporation is in bankruptcy: *Fourth National Bank v. Francklyn*, 120 Id. 747. In giving construction to the California statute, the obligations of stockholders to pay their respective proportions of the corporate debts is held to be direct and primary: *Faymonville v. McCollough*, 59 Cal. 285, 286, citing the principal case; *Mitchell v. Beckman*, 64 Id. 117; and that a creditor is not bound to exhaust the remedies against the corporation, which the law has provided for his protection, before proceeding against the stockholder: *Morrow v. Superior Court*, 64 Id. 383. It is held that the stockholders of a corporation are not, as regards the creditors of such corporation, sureties, but principal debtors: *Sonoma Valley Bank v. Hill*, 59 Cal. 107; and stockholders are not generally regarded as sureties or guarantors of the corporation: See *Craig's Appeal*, 92 Pa. St. 396. It is, however, held by the supreme court of Michigan that stockholders occupy, as regards creditors, the position of sureties for the corporation: *Hanson v. Doukersley*, 37 Mich. 184; *Grand Rapid Savings Bank v. Warren*, 52 Id. 557. Compare *Wheeler v. Fausot*, 37 Ohio St. 26.

In some of the states the statutory liability of stockholders is extended to all persons who were stockholders when the debt sought to be enforced was contracted, and also to all persons who are stockholders when the liability is sought to be enforced, although they may have become such since the debt was contracted; but is not extended to persons who had become stockholders after the debt was contracted and had ceased to be such before the debt became payable and action was brought: *Curtis v. Harlow*, 12 Met. 3; *Johnson v. Somerville Dyeing etc. Co.*, 15 Gray, 216; *Sales v. Bates*, 6 East. Rep. 703 (R. I.); S. C., 14 Am. & Eng. Corp. Cas. 106; and compare *Weber v. Fickey*, 47 Md. 196; *Phillips v. Therasson*, 11 Hun, 141; *Wheeler v. Fausot*, 37 Ohio St. 26; *Wheeler v. Millar*, 90 N. Y. 353. To make a subscriber to stock an owner, so as to be liable for the corporate debts, it is not necessary that he should have paid for his stock, nor that a certificate therefor should have been issued. Where the corporation has agreed that a person shall be entitled to certain shares of its stock, to be paid for in a certain manner, and

he consents to take the stock, he becomes owner: *Mitchell v. Beckman*, 64 Cal. 117. So where stock is transferred by one acting as agent for the owner, and the assignee receives a certificate and appears as a stockholder on the books of the corporation, he is, as between himself and the creditors of the corporation, a stockholder within the purview of the statute: *Wakefield v. Fargo*, 90 N. Y. 213. If a certificate of stock has been issued to a party by a wrong christian name, through mistake, parol evidence is admissible to show the mistake, in an action brought to enforce his liability as a stockholder: *Cleveland v. Burnham*, 64 Wis. 347.

The "debts" of a corporation for which the stockholders are by statute made liable do not, in their legal sense, ordinarily include liabilities for torts not reduced to judgment: *Child v. Boston etc. Iron Works*, 137 Mass. 516. A liability for a tort is not a "debt" under a statute which is to be construed strictly: *Esmond v. Bullard*, 16 Hun, 65; and see *Bohn v. Brown*, 33 Mich. 257; *Dryden v. Kellogg*, 2 Mo. App. 87; *Zimmer v. Schleeauf*, 115 Mass. 52.

Whether a judgment recovered by a creditor against the corporation be conclusive against the stockholders when sued individually on their statutory liability is a question upon which the decisions are conflicting. In Massachusetts, the judgment is held to be conclusive against the stockholders: *Thayer v. New England etc. Printing Co.*, 108 Mass. 523; or if not conclusive, is at least *prima facie* evidence of the plaintiff's claim: *Hawes v. Anglo-Saxon Petroleum Co.*, 101 Id. 385; and see also *Grand Rapids Savings Bank v. Warren*, 52 Mich. 557; *Grund v. Tucker*, 5 Kan. 70. But a different view is taken in New York, and a creditor who pursues the stockholders is not permitted to rely upon the judgment against the corporation, but is compelled to make proof of the indebtedness upon which the judgment was recovered: *Miller v. White*, 50 N. Y. 137; *McMahon v. Macy*, 51 Id. 155; *Hastings v. Drew*, 76 Id. 9; *Wheeler v. Millar*, 24 Hun, 541; S. C., 90 N. Y. 353; *Kraft v. Coykendall*, 34 Hun, 285. The judgment against the corporation is held to be of no virtue or effect in the action against the stockholder, and is only evidence as proving the performance of the condition precedent: *Kincaid v. Duinelle*, 59 N. Y. 551; and see, as favoring the New York view, *Trippe v. Hunchcom*, 82 Ind. 307; *Union Bank v. Wando Mining Co.*, 17 S. C. 330.

BLOOD v. MARCUSE.

[38 CALIFORNIA, 590.]

SECRETARY OF CORPORATION HAS NO POWER, BY VIRTUE OF HIS OFFICE, to make assignment of promissory notes of the company, nor unless expressly authorized to do so in his official capacity.

MONEY COLLECTED UPON JUDGMENT UNDER INVALID ASSIGNMENT MAY BE RECOVERED OF the assignee by a judgment creditor of the party rightfully entitled thereto.

JUDGMENT IN FAVOR OF ASSIGNEE OF NOTE UNDER INVALID ASSIGNMENT DOES NOT ESTOP the claimant of the proceeds of such judgment, under the rightful owner, unless it appears that the fact of the assignment was put in issue between debtor and assignee.

ESTOPPEL BY MATTER OF RECORD MUST BE PLEADED.

ACTION upon a promissory note. It appeared that the Whitney Quartz Mining Company, a corporation, brought an

action against the Crescent Quartz Mining Company, upon the latter's note for twelve thousand dollars, and attached all of defendant's property. Thereafter the defendants in this action, M. and M. A. Marcuse, sued the Crescent Quartz Mining Company, and attached all its property. After the bringing of the latter action, the defendants in this action (plaintiffs therein) purchased of the Whitney Quartz Mining Company the note upon which the first-mentioned action was brought, under an arrangement by which the purchasers of said note were to credit one Bollinger, who was indebted to them, with the amount thereof, and that Bollinger, to whom the Whitney Quartz Mining Company was indebted in a greater sum, should also credit the amount of said note upon said indebtedness. This arrangement was carried out, Chambers, the secretary, and a trustee, and Bollinger, another trustee, making the transfer of the note. Thereafter the plaintiff in the present action brought an action against the Whitney Quartz Mining Company, and had a writ of attachment issued therein, which was served upon the present defendants, with notice of garnishment. Judgment was afterwards rendered for plaintiff in the said action. One Holthouse and Whitlock, about the same time, recovered a judgment against the Whitney Quartz Mining Company, and transferred the same to the plaintiffs in the last-mentioned action, who had execution issued thereon, and served upon the present defendants as garnishees. The defendants answered upon both garnishments, denying any indebtedness to the Whitney Quartz Mining Company, and the plaintiff then brought this action against the defendants to recover the amount of the note transferred to them by the Whitney Quartz Mining Company. Plaintiff was nonsuited, on the ground that there was no evidence that defendants were ever indebted to the Whitney Quartz Mining Company. A motion for a new trial was overruled, and plaintiff appealed.

Van Cloif and Gear, for the appellant.

Charles E. Filkins, for the respondents.

By Court, RHODES, J. The note of the Crescent company was assigned by the secretary of the Whitney company in his official capacity. The assignment purports to be made by the Whitney company, but it was not executed by the corporation. It is not, therefore, a corporate act, unless the secretary was

not only authorized to make the assignment, but also to make it in his official capacity. The secretary is not vested with such authority by virtue of his office, and no delegated authority from the corporation is shown; and under the authority of *Gashwiler v. Willis*, 33 Cal. 16, and the cases therein cited, the assignment was void. No ratification by the corporation of the assignment is shown. The alleged settlement made between the corporation and Bollinger, and the giving of the credit by the latter to the corporation, was only an arrangement between Bollinger and the secretary of the company; but it does not purport to be a corporate transaction; and no corporate authority to the secretary to conclude such an arrangement appears, nor has the corporation adopted the act of the secretary in that behalf.

The money received by the defendants on the note—or rather on the judgment obtained by them on the note—was the money of the Whitney company, unless the latter was estopped by the judgment from setting up a claim to the money. An action had been commenced by the Whitney company against the Crescent company, the maker of the note, before the attempted assignment of the note to the defendants, and judgment was afterward rendered in the action against the Crescent company, and in favor of one of the present defendants, the assignee of the note, but for the benefit of both defendants. The position of the defendant as to the effect of the judgment is fully met by either of these considerations: it does not appear that the fact of the assignment of the note was in issue between the Whitney company and the alleged assignee; and if that fact was in issue, and was determined in favor of the assignee, the estoppel is not pleaded in this cause.

For these reasons, we think the court was in error in granting a nonsuit.

Order reversed, and cause remanded for a new trial.

CROCKETT, J., did not participate in the decision.

CORPORATION IS NOT BOUND BY UNAUTHORIZED contract of its secretary
See *Hall v. Crandall*, 89 Am. Dec. 64, and note.

BAKER v. KINSEY.

[38 CALIFORNIA, 631.]

MASTER IS LIABLE FOR SUCH ACTS OF HIS SERVANTS ONLY as are within the line of his duty.

OWNER OF BRIDGE IS NOT LIABLE FOR INJURY CAUSED BY BITE OF DOG belonging to his toll-keeper, if it appears that he did not authorize or require the dog to be kept, and that it was not needed for the conduct or protection of the business in which the owner of the dog was employed.

ACTION for damages. The opinion states the facts.

Bowie and Catlen, for the appellant.

Alexander and Armstrong, and O. C. Lewis, for the respondent.

By Court, SANDERSON, J. This is an action to recover damages for personal injuries sustained from a bite by a vicious dog. The plaintiff was nonsuited as to Eastman, one of the defendants, but recovered as against the others, Kinsey and Dyer. Kinsey moved for a new trial without success, and then brought the case here, and asks a reversal upon the grounds,— 1. That so far as he is concerned, the verdict is not sustained by the testimony; and 2. That in respect to him, the charge of the court was erroneous. But a separate consideration of these grounds is not deemed necessary.

The testimony shows that the defendant Dyer was in the employment of the defendant Kinsey and one Whitely, as keeper and collector of tolls, at a bridge near Folsom, which bridge and toll franchise was the joint property of Kinsey and Whitely; that both Kinsey and Whitely were non-residents of Folsom,—the former being a resident of San Francisco, and the latter of the state of New Jersey; that the defendant Eastman resided at Folsom, and acted as agent of Kinsey and Whitely in employing Dyer as keeper, and in receiving from Dyer the tolls, and transmitting them to Kinsey and Whitely; that Dyer procured the dog, while a pup, through Eastman, at his own suggestion, and kept him at the bridge as a companion, and because he had a fancy for dogs; that the dog was vicious, and accustomed to bite mankind, and that he was not securely kept by Dyer, but was suffered at times to go at large, without being guarded or muzzled; that the vicious disposition of the dog was known to Dyer and Eastman. But the testimony fails to show that either Kinsey or Whitely ever heard of the dog, or that they had directed Dyer or East-

man to keep a dog at the bridge, or that they had consented that one should be kept there, or that there was any reason or necessity for keeping a dog at the bridge, so far as any interest of Kinsey or Whitely was concerned.

It thus appearing that Kinsey did not in fact keep or harbor the dog in person, and did not in fact authorize or require him to be kept, and did not in fact need that the dog should be kept for the conduct or protection of the business in which Dyer was employed, or as an assistant to Dyer, it is obvious that there can be no ground or principle of law upon which the verdict can be sustained, unless it be the doctrine of *respondeat superior*. In view of these facts, unless Dyer acted as the servant of Kinsey, in the matter of keeping and harboring the dog, Kinsey cannot be held responsible for the injuries which the plaintiff sustained; for that relation, in the particular act of which complaint is made, is the test in every case, as to whether the principle of *respondeat superior* applies.

In order to hold the master responsible for the act or omission of the servant, it must appear that the act or omission was, in contemplation of law, the act or omission of the master. Said Holt, C. J., in *Middleton v. Fowler*, 1 Salk. 282: "No master is chargeable with the acts of his servant, but when he acts in execution of the authority given by his master, and then the act of the servant is the act of the master." So if the servant can justify his act to his master as being within the line of his duty to him, the act is the act of the master, and not otherwise: *Harlow v. Humiston*, 6 Cow. 189. So are all the cases: *McManus v. Crickett*, 1 East, 108; *Mitchell v. Cressweller*, 13 Com. B. 108; *Coleman v. Riches*, 16 Id. 104; *Hay v. Cohoes Co.*, 3 Barb. 42; *Boswell v. Laird*, 8 Cal. 497 [68 Am. Dec. 345]; *Fanjoy v. Seales*, 29 Id. 249; *Kline v. Central Pacific R. R. Co.*, 37 Id. 400; *Du Pratt v. Lick*, 38 Id. 691.

But it is further argued on the part of the plaintiff,—1. That Kinsey, being one of the proprietors of the bridge, had therefore control over the bridge, and could have forbidden and prevented the keeping of a vicious dog by his servant, in possession of the bridge, and ought to have done so if he knew the dog was vicious, which, as is further argued, he must be held to have known, because his agent knew it; and 2. That being one of the proprietors of the bridge he was bound to see that it was kept in repair and clear of obstructions, and in all respects safe and fit for the use of the public; which duty, as is further argued, includes the further duty of seeing that no

vicious dogs are allowed to be about the toll-house, rendering an approach to it, for the purpose of paying toll, dangerous to the persons of travelers.

The control which Kinsey had over the bridge and toll-house was not such an immediate or actual control as would constitute him the keeper or harbinger of such domestic animals as might at any time be found on the premises. In *Wilkinson v. Parrott*, 32 Cal. 102, it was claimed that the dog, although kept and harbored upon the premises where Parrott resided, and over which he, therefore, had complete dominion, was so kept by one of his servants; yet it appearing that Parrott knew that the dog was kept about his premises, and that he was vicious, the fact that the property in the dog may have been in the servant was not considered as relieving Parrott from responsibility. The facts here, however, are widely different. Kinsey was not in the actual possession and control of the toll-house, nor did he know that the dog was being kept or harbored there by his servant, nor did he know the character of the dog. The facts, therefore, and all of the facts upon which Parrott was held to be a keeper of the dog, within the meaning of the law, are entirely wanting in this case.

Nor do we think that the dog can be considered as an obstruction to safe traveling across the bridge, within any rule of law, as to the obligation of Kinsey to keep the bridge in a safe condition. But accepting the dog as an obstruction, the plaintiff must still fail of a case, for the obstruction is not shown to have been put there by Kinsey's direction, and the nature of Dyer's employment, for aught that appears, was not such as to authorize or require it. Suppose Dyer had willfully taken up a plank in the bridge, without any occasion to do so, for the purpose of repairs or otherwise, and without the knowledge or direction of Kinsey, and by reason thereof the plaintiff had sustained his injury, could there have been any pretense for holding Kinsey responsible? That there could not is clear from the cases already cited, for the act would not have been within the general scope of Dyer's duty or employment, nor within any express authority given by Kinsey. If, then, the dog was an obstruction to safe travel, it was an obstruction put there by Dyer, not in the course of his employment, nor under any express direction from Kinsey, but willfully, and without authority from his master; and by parity of reason, Kinsey can no more be held responsible than in the case supposed.

Judgment and order reversed as to Kinsey, and a new trial granted.

MASTER'S LIABILITY FOR SERVANT'S TORTS: See *Covigan v. Union Sugar Refinery*, 96 Am. Dec. 685, and note. The principal case is cited generally as an authority on this subject, in *Hudson v. M. K. & T. Ry Co.*, 18 Kan. 475.

BLOOD v. LIGHT.

[38 CALIFORNIA, 649.]

LEVY OF EXECUTION HAS NO FURTHER EFFECT THAN TO FIX DATE of commencement of the sheriff's title as against all persons who are not parties to the writ.

PURCHASER AT SHERIFF'S SALE, TO SUSTAIN HIS TITLE, IS ONLY REQUIRED TO SHOW a sale and the authority of the officer to make it. The deed proves the sale, and the judgment and execution are proof of the authority of the officer to make the sale.

VALIDITY OF TITLE OF PURCHASER AT SHERIFF'S SALE IS UNAFFECTED by failure of the officer to make the levy in the mode prescribed by statute, for his power to sell comes from the judgment and execution, and is not to be measured by his proceedings under the writ.

ERRONEOUS RECITAL OF EXECUTION IN SHERIFF'S DEED WILL NOT AFFECT the validity of the deed if the sheriff in fact had authority to sell.

EJECTMENT. The variance between the execution recited in the sheriff's deed and that offered in evidence consisted in the fact that the latter directed the sheriff to make the amount of the judgment "out of the real property of A. and E. Light," while the former commanded him to make the judgment out of the realty of the same parties "belonging to them on the 23d day of August, 1867." The remaining facts appear in the opinion.

Van Olief and Gear, for the appellant.

J. M. Burt and W. C. Belcher, for the respondent.

By Court, **SANDERSON, J.** This is an action of ejectment, founded in part upon a constable's sale and deed. The judgment in the court below passed for the plaintiff, and the defendant has brought the case here.

At the trial, a judgment rendered on the 27th of August, 1867, in the court of A. F. Blood, a justice of the peace of Plumas County, in favor of Hugh Mullen and against A. and E. Light (the latter being the defendant in this action), doing business as Light and Brothers, for \$293.10 and costs, taxed

at \$31.50, was offered in evidence by the plaintiff, and admitted without objection.

The plaintiff next offered an execution which had been issued upon said judgment, with a return thereon, which showed a sale of the premises in question to one Clark, but was otherwise entirely silent as to whether a levy had been made prior to the sale. The defendant objected to the admission of the return, because it failed to show that any levy had been made, or that the sale had been made by virtue of a levy under the execution, which objection was overruled, the defendant excepting.

The plaintiff next offered a constable's deed to Clark of the premises in question, which recited the judgment and execution aforesaid, and a levy and sale thereunder, to Clark. To the admission of the deed the defendant objected, upon the ground that the execution recited in the deed differed materially from that which had been given in evidence, and upon the further ground that, without a levy, no title could have passed, and no levy had been shown as yet. These objections were also overruled, the defendant excepting. The plaintiff proved, lastly, that whatever title Clark took by the constable's deed had come to him by mesne conveyances, and rested.

The defendant, in response to the plaintiff's case, put the constable upon the stand, and proposed to prove by him that the recital of a levy in the deed was false, and that no levy was in fact made. To this the plaintiff objected, upon the ground that the defendant having been defendant in the judgment and execution under which the sale had been made, was estopped by the constable's deed from denying the regularity of the constable's proceedings, or the truth of his recitals, which objection was sustained, the defendant excepting.

The fact that the officer had failed to expressly state a levy in his return was no reason why the return should be excluded. It stated a sale, and although not indispensable, was admissible to prove the sale of the premises to Clark, if the plaintiff thought proper to introduce it for that purpose.

It is settled in this state that a purchaser at a sheriff's sale does not depend in any respect for his title upon the return of the sheriff. In derailing his title, he may use the return, if there is one which is satisfactory to him, for it is legal evidence for him of the official acts which it recites, but in no case is he required to introduce it, and in no case can he be

prejudiced by it, whatever be its terms. He is only required to show a sale, and the authority of the officer to make it; the judgment and execution prove the latter, and the deed the former. He is bound to see that there is a judgment which is not void, and an execution which is regular upon its face; but as to all the acts of the officer under the execution which precede the sale, he may rely upon the legal presumption that they have been duly performed; that the officer has found no personal property; that he has seized upon the land which he is about to sell, and that he has advertised the sale as required by law: *Cloud v. El Dorado County*, 12 Cal. 133; *Clark v. Lockwood*, 21 Id. 224; *Moore v. Martin*, 38 Id. 428. The statute is directory, so far as it deals with the manner in which the officer is required to execute the writ: *Smith v. Randall*, 6 Id. 50; *Webber v. Cox*, 6 T. B. Mon. 110; *Hayden v. Dunlap*, 3 Bibb, 216; and hence, although his failure to comply with its provisions may be sufficient cause to set the sale aside, upon the application of the parties to the writ, yet it does not render the sale void: *San Francisco v. Pizley*, 21 Cal. 59. It is the policy of the law to uphold judicial sales, when collaterally attacked by securing purchasers, as far as possible without prejudice to others, against risk. Such a course is to the interest of both creditors and debtors, who would be alike prejudiced by a rule which would tend to the insecurity of titles obtained in that way. It is no obstacle to this policy to require the purchaser to take the risk of the officer's authority to sell, for that can be readily determined by an inspection of the judgment and execution under which he is acting; but to require him to ascertain and determine whether the officer has left a copy of the writ with the occupant of the land; or, if there was no occupant, that he has posted a copy upon the premises, and filed another copy, with a description of the land, with the county recorder, in cases where the land stands on the records of the county in the name of the defendant in the execution; or, when it stands upon the records in the name of some other person, that he has left with such person, or his agent, a copy of the writ and a notice that the land (describing it), and any interest which the defendant has therein, has been seized under the writ, and that he has filed a copy of the writ and notice with the recorder of the county, and left another copy with the occupant of the land; or, if there was no occupant, that he has posted a copy in a conspicuous place on the land, that

the judgment debtor has no personal property, that the land is being sold in appropriate parcels, or that it is being sold according to the directions of the judgment debtor, and that it has been advertised according to law,—would amount almost to an inhibition upon judicial sales, and tend greatly to the sacrifice of the land to the prejudice of all the parties concerned. Guided by these considerations, the legislature has nowhere provided that the validity of a purchaser's title shall depend upon the manner in which the officer has performed his duty; but, on the contrary, without any limitation or qualification to that effect, has provided that "upon a sale of real property the purchaser shall be substituted to and acquire all the right, title, interest, and claim of the judgment debtor thereto": Sec. 299. Whether the officer has performed his duty lies between him and the parties to the writ, and the purchaser cannot be prejudiced by his remissness or neglect.

The cases cited to the contrary from Tennessee (*Trott v. McGavock*, 1 Yerg. 469, *Rogers v. Jennings*, 3 Id. 308, *Loyd v. Anglin*, 7 Id. 428, *Mitchell v. Lipe*, 8 Id. 181) are founded upon a statute which provides in terms "that every sale of land under execution, made contrary to the provisions of this act, shall be null and void to all intents and purposes." It was under this clause that it has been held in that state that the purchaser must not only show a compliance on the part of the officer with all the directions of the statute, but that a return of the officer to that effect may be contradicted by parol testimony. There being no such or similar provision in the statute of this state, the cases referred to are not in point.

The same is true of the cases cited from New England: *Morton v. Edwin*, 19 Vt. 77; *Sleeper v. Newbury Seminary*, 19 Id. 451; *Howe v. Blanden*, 21 Id. 315; *Williams v. Amory*, 14 Mass. 20; *Ware v. Barker*, 49 Me. 358. They are cases of title derived under a statute extent or title of record. In such cases, the doings of the officer in making the extent must be returned, for they are to be entered of record, and when recorded, they make a title to the creditor as against the debtor, his heirs and assigns. Under such statutes, the land of the debtor is not sold, but is appraised by three disinterested freeholders, and set apart by metes and bounds to the creditor. No deed is to be given, but the return of the officer, showing his proceedings in full, is to be recorded, and stand in the place of a deed. It may well be held under such statutes that the return of the officer must show a full compliance

with all the provisions of the statute in relation to the manner of executing the writ, and that it cannot be added to or contradicted by parol; but it is obvious that cases arising under statutory provisions so radically different can give no aid in the construction of the statute of this state.

The statute of this state, however, contains a clause upon which much reliance is placed by counsel in support of the proposition that the purchaser must prove a statutory levy, or that a statutory levy is indispensable to the validity of his title. This clause is found at the close of section 217, and reads thus: "Until a levy, property shall not be affected by the execution."

It is argued that this clause is equivalent to a formal declaration on the part of the legislature like that just referred to in the statute of Tennessee, that no title shall pass, unless there has been a levy by such acts as the statute prescribes.

The purpose intended to be subserved by this clause of the statute is not the purpose suggested by counsel. By its use a mischievous rule of the common law was annulled, and nothing more.

By the common law, all judgments had relation to the first day of the term at which they were rendered, and an execution could be issued and tested as of that day; and also by the common law, the goods of the defendant were bound by the execution from its date. Under this rule, the title of the sheriff was better than that of a *bona fide* purchaser, who may have purchased the goods of the defendant in the execution even before any judgment was in fact entered against him, or an execution awarded: *Anonymous*, 1 Croke, 174; *Boucher v. Wiseman*, 1 Id. 440. To avoid the mischiefs which resulted from such a rule, it was enacted in the statute against frauds and perjuries of 29 Car. II., c. 3, sec. 16 (English Statutes at Large, 7 & 8 Will. III., c. 12, p. 430): "That no writ of *fiery facias* or other writ of execution shall bind the property of the goods, against whom such writ of execution is sent forth, but from the time that such writ shall be delivered to the sheriff, undersheriff, or coroners, to be executed." By this statute, the evils of the former rule were much lessened, but not entirely obviated, for the defendant in the execution might sell to a *bona fide* purchaser after the delivery of the writ to the officer, and before he had undertaken its execution in such a manner as to give notice of his title. The statute of this state in providing that until a levy property shall not be effected by the exe-

cution has gone further than the English statute, and has entirely obviated the evils of the common-law rule.

Such being, as we consider, the sole purpose of the clause in question, it follows that the seizure or the taking of the property into the custody of the officer, in the manner described in the statute, has no further effect than to fix the date or commencement of the sheriff's title as against all persons who are not parties to the writ. If, in the case of personal property, the officer has made no seizure until the day of the sale, the sale is nevertheless valid as against the defendant in the execution, but the title transferred by the sale cannot antedate the day of the sale as against *bona fide* purchasers, or other creditors who may have acquired a lien upon the goods: *Allentown Bank v. Beck*, 49 Pa. St. 409. So in the case of land. If the judgment under which the sale is made is a lien, the title dates from the docketing of the judgment as against third persons, and not from the date of any real or pretended statutory levy. If, as in the present case, the judgment is not a lien, the title as against third persons dates from the statutory levy, if there was one, and if not, from the filing of the certificate of sale describing the land with the recorder of the county.

Upon this branch of the case, our conclusion is, that the validity of the purchaser's title is unaffected by the failure of the officer to make a seizure of the land in the mode or by the steps described in the statute; that his power to sell comes from the judgment and execution, and is not to be measured by his proceedings under the writ; that if he sells the land by a description sufficiently certain, the title of the debtor as against the parties to the writ will pass, unless redeemed within the time prescribed by the statute; that any act on the part of the officer showing an intent to sell the specific land, and subject it to the satisfaction of the judgment, followed by a sale, constitutes a levying of the execution as against the defendant: See *Bouvier's Law Dictionary*, word *Levy*; that the performance of the acts described in the statute as a levying of the execution is material only in reference to the intervening rights of third persons, or persons who are not parties to the writ; that it is undoubtedly the duty of the officer to proceed strictly according to the statute, and if he does not do so, the sale may be set aside, upon motion, or he may be made to respond in damages to any one who has been injured by his neglect; but it would be gross

injustice to hold that by proof of such neglect, made, perhaps, years after the sale, the purchaser's title shall be defeated.

Were we to hold that a seizure, such as is described in the statute, is indispensable to pass the title, we should still have to sustain the judgment of the court below. The deed recites a levy, which recital is not only evidence of a levy (a judgment and execution having first been shown), but it is conclusive evidence, as against this defendant, who was a party to the execution: *Donahue v. McNulty*, 24 Cal. 417; *Hihn v. Peck*, 30 Id. 287. Moreover, if the deed contained no such recital, the defendant would be estopped nevertheless from questioning in any respect the plaintiff's title. The constable's deed is the defendant's deed. The grant is as much his as if he had signed the deed, and therefore he can make no defense against the deed: *Dodge v. Walley*, 22 Id. 224; *McDonald v. Badger*, 23 Id. 399. Said Justice Washington, in *Lessee of Cooper v. Galbraith*, 3 Wash. C. C. 550: "The sheriff is empowered by law to convey by deed to the purchaser, under an execution, all the right, title, interest, and estate of the defendant, as fully as the defendant himself, or an attorney empowered for that purpose by him, could have done. The officer, in fact, acts as such attorney, appointed for that purpose by law. The purchase-money is paid to the defendant in the execution, or is applied to his use in discharge of his debt, between whom and the purchaser the law raises a contract in like manner as if the conveyance had been made by him. The cases cited by the plaintiff's counsel are full to the point that the purchaser under an execution, in an ejectment against the defendant in the execution, or one claiming under him, need not show any other title than a judgment, execution, and sheriff's deed; and that the defendant will not be permitted to controvert such title by showing it to be defective, or by setting up a better outstanding title in a third person." To the same effect is the language of Chief Justice Hornblower, in *Den v. Winans*, 14 N. J. L. 6. Such being the case, it would be idle to require the purchaser to prove a levy, for that would be to require proof of a fact which cannot be disputed.

The alleged variance between the execution recited in the deed and the execution in evidence is not material in any event. While it is the usual and proper course to recite in the deed the authority of the officer, such recitals are not in-

dispensable to the validity of the deed; and hence, if the execution is erroneously recited, it will not affect the validity of the deed, if the officer, in fact, had authority to sell: *Jackson v. Pratt*, 10 Johns. 381.

Judgment and order affirmed.

VALIDITY OF TITLE OF PURCHASER AT SHERIFF'S SALE does not depend upon the levy. The purchaser, to sustain his title, need only show his deed, and that the officer had authority to sell, of which the judgment and execution are proof: See *Solomon v. Peters*, 92 Am. Dec. 69, and note, and *Hunt v. Loucks*, ante, p. 404, and cases in note; and the citations of the principal case in *French v. Edwards*, 13 Wall. 514; *Clark v. Sawyer*, 48 Cal. 140; *Montgomery v. Robinson*, 49 Id. 280; *Los Angeles Co. Bank v. Bayner*, 61 Id. 147; *Kelley v. Desmond*, 63 Id. 519; *Roush v. Fort*, 2 Mont. 485.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

COLLIER v. STATE.

[39 GEORGIA, 31.]

ONE WHO SHOOTS AT ANOTHER IN FUN IS RESPONSIBLE FOR CONSEQUENCES OF HIS ACT. The law implies malice from this reckless trifling with human life.

THAT ONE WHO SHOT AT ANOTHER IN FUN, AND HIT HIM, APPEARED TO BE VERY SORRY, may go to show want of express malice, but will not rebut the malice which the law implies from such recklessness.

DEFENDANT was indicted and convicted of assault with intent to murder one Williams, upon the following facts: Defendant went into the field where Williams was working, and said: "I am after you." Williams ran off a piece, when defendant said: "Come back, I wont hurt you; if you run, I will shoot you." They had some further talk of this kind, when defendant presented his pistol, and shot Williams in the leg. Defendant had been raised in Williams's family, and was on terms of great intimacy with him, and frequently had frolics with him. After the shooting, defendant expressed great sorrow, and promised to pay all the damages it occasioned. This is an appeal from a refusal to grant a new trial.

H. Morgan, for the plaintiff in error.

R. H. Whitely, solicitor-general, for the state.

By Court, McCAY, J. 1. We see no error in the charge of the court. The law is put fairly, both for and against the prisoner, according to the facts as they appear in the record.

2. We see nothing in the testimony to mitigate this offense;

nothing favorable to the prisoner that the charge of the judge excluded from the consideration of the jury. It is true that after the deed was done the prisoner appeared very sorry. Perhaps he was; and this is evidence, as far as it goes, of want of express malice. But it is no evidence at all rebutting that malice which the law presumes from reckless trifling with human life.

The best that can be said for the prisoner is that he did not affirmatively intend to kill,—perhaps not even to wound. He was doubtless playing upon the fears of a timid fellow-being. He fired at him,—towards him,—and hit him. He had no right to so fire, whether in fun or in earnest. If the latter, it was express malice; if the former, malice is implied by law. That sort of fun is not permitted among civilized people; and he who indulges in it is treated as though he intended the result of his act. It is trifling with justice to allow any weight to the remorse of this prisoner after his reckless act had produced its result. Let him and others take warning. Human life is too sacred a thing to be thus played with; and notwithstanding his sorrow,—which he ought to feel for his foolery,—we do not feel disposed to turn aside the sword of justice.

Judgment affirmed.

IN CASE OF HOMICIDE, MALICE MAY BE IMPLIED FROM ANY UNLAWFUL ACT dangerous to life, committed without lawful justification: *State v. Moore*, 95 Am. Dec. 776; accidental killing, when excusable: *State v. Benham*, 92 Id. 416; one who fires recklessly into a crowd, without any special purpose, and kills another, is guilty of murder: *Golliher v. Commonwealth*, 87 Id. 493.

MALICE FROM WHAT ACTS PRESUMED: See *Commonwealth v. Webster*, 52 Am. Dec. 711; *McWhirt's Case*, 46 Id. 196.

MALICE IS IMPLIED IN ALL CASES where the slayer takes life for threats, words, or menaces, without other provocation: *Braswell v. State*, 42 Ga. 613, citing the principal case.

SIMS v. SIMS.

[39 GEORGIA, 106.]

CHILD WHO HAS RECEIVED ADVANCEMENT MUST ACCOUNT FOR IT when he seeks to come in as a distributee, and the advancements must be estimated at their value at the time they were received, unless there was a value fixed at the time, by agreement.

ADVANCEMENT MUST BE ACCOUNTED FOR AT ITS VALUE WHEN RECEIVED, and its subsequent depreciation in value or destruction cannot be relieved against by the court.

WHAT IS NOT WILL. — Memorandum of advancements made by a deceased, no matter how strictly kept or clearly proved, nor his dying words spoken in the presence of all his family, no matter how just, unless it can be proved as a will, can receive no notice from the courts.

MEMORANDA OF ADVANCEMENTS KEPT BY DECEASED ARE EVIDENCE OF FACT OF ADVANCEMENT, and are *prima facie* evidence of its value, but they are in no sense a will.

ESTIMATED VALUE OF ADVANCEMENTS AND OF ESTATE MUST TAKE PLACE TWELVE MONTHS FROM ADMINISTRATION, which is the time for the first distribution.

THE opinion is sufficiently clear without any statement of the case.

B. H. Hill, for the plaintiff in error.

Matthews and Reed, and Toombs and Du Bose, for the defendant in error.

By Court, McCAY, J. 1. Our code, sections 2538 to 2542, settles with precision that a child who has received advancements shall account for them, if he proposes to come in as a distributee, and that advancements shall be estimated at their value at the time they were received, unless there was a value fixed at the time, by agreement. The fact that an advancement has become valueless, by destruction, or death, or emancipation, since it was received, or that it has, by growth or by appreciation, become more valuable, has nothing to do with it. Indeed, it would seem to be the express intent of the statute to settle this very matter, as it does, by enacting that the value of the advancement at the time of its reception is the criterion: Code, sec. 2542. We see no difference between the loss of a slave by death, or his depreciation in value so as to be worth less from sickness, and his loss by the act of the government,—by emancipation. It is true that the sudden emancipation of the slaves of the state by the results of the late war has, as to this kind of property, made the law of the code perhaps an unjust one. The whole advancement has been lost, and the estate out of which the heirs are to get their portions has suffered in the same way; so that it now often occurs that an advanced child has to account for an advancement, while those who have not been advanced, and who have lost their share of an estate by emancipation, get compensation in other property. Several such cases as well as the present have come under my observation. We are inclined to think that this rule prescribed by the code needs some modification to meet the extraordinary circumstances in which we now find

ourselves. But this modification is not the business of the courts. The code is plain and positive, and as a general rule, experience proves that it is wise and just. And if the anomalous state of things produced by emancipation has, as we think in the main true, made the rule to some extent unjust and inequitable, the remedy is with the legislature, and not with the judiciary. A court has no power to mold the rules of law to suit the changed circumstances of the country. We therefore are constrained to obey the law, although in this and perhaps in many other instances of advancements of slaves, it is not strictly equitable. If a remedy is needed, it is for the legislature to supply it.

2. If one die without a will, the law provides how his estate shall be distributed, and nothing is a will that does not comply with the requirements of the statute. A memorandum of the intestate, no matter how clearly proven, his dying words, in the presence of all his family, no matter how just, unless it can be proven as a will, can receive no notice from the courts.

To allow these memoranda, kept by the testator, perhaps with great care and fairness, to point out how his estate shall be distributed, would be to repeal the whole law on the subject of wills and the distribution of estates. The deceased died testate or intestate. If the former, his will must be probated according to law. If the latter, then the law points out the mode of distribution, and his wishes have nothing to do with it.

Suppose the book kept by him had said in express language: "I wish my children to be equal at my death, and that my estate shall be divided in kind, giving each of the heirs not advanced, specific articles, such as the advanced children have gotten, and this without regard to the value of the articles." This would clearly be a will. It would dispose of his property differently from the disposition made by law.

Shall we do by inference that which we could not do had the testator directed in words not executed as a will? Clearly not. The statute prescribes the effect of these memoranda of advancements, — 1. They are evidence of the fact of the advancement; 2. They are *prima facie* evidence of its value. But they are not a will, and they can have no force as a will, because not executed as the law requires: Code, sec. 2539.

3. The Code (section 2542) provides that the advancement shall bear interest from the time of the first distribution. This is directed to take place in twelve months from the ad-

ministration. Clearly, therefore, the first distribution is the time fixed by law for estimating the value of the advancements and the value of the estate. What the estate is worth at that time, after paying the debts, added to the advancements brought in, and the whole divided by the number of distributees, is the share of each.

Judgment affirmed.

ADVANCEMENTS, WHAT CONSTITUTE, AND EVIDENCE OF: See *Wooley v. Wooley*, 95 Am. Dec. 620, and note.

WHETHER OR NOT WRITING IS WILL: *Burlington University v. Barrett*, 92 Am. Dec. 376; *Babb v. Harrison*, 70 Id. 203; *Michael v. Baker*, 71 Id. 592; *Evans v. Smith*, 73 Id. 751, and notes.

DEED OF GIFT CONVEYING PROPERTY TO CHILD, but having no words indicating any intention that it is an advancement, operates presumptively as an advancement: *Holliday v. Wingfield*, 59 Ga. 208, citing the principal case.

KITCHENS v. KITCHENS.

[29 GEORGIA, 168.]

EXECUTION OF LOST WILL MUST BE PROVED BY THREE SUBSCRIBING WITNESSES, if in life, and within the jurisdiction of the court, as in the case of the probate of a will in solemn form.

PROOF OF LOSS OF WILL, AND THAT IT WAS NOT REVOKED. — After the execution of a missing will has been duly proved, its destruction or loss, and the facts necessary to rebut the presumption that it had been revoked by the testator, may be proved by such evidence as satisfies the conscience of the jury.

PROOF THAT LOST WILL HAD NOT BEEN REVOKED BY TESTATOR MUST BE VERY CLEAR AND STRONG. But as in all other cases where there is a conflict, the jury must determine.

WHERE THERE IS EVIDENCE TO SUSTAIN VERDICT OF JURY, the appellate court will not disturb their finding.

THE opinion states the case.

W. W. Clark, F. Jordan, and A. Reese, for the plaintiff in error.

W. A. Lofton and George E. Bartlett, for the defendant in error.

By Court, BROWN, C. J. This proceeding was instituted under section 2396 of the revised code, and the case turns upon the proper construction of that section, which is in these words: "If a will be lost or destroyed subsequent to the death, or without the consent, of the testator, a copy of the same,

clearly proved to be such by the subscribing witnesses and other evidence, may be admitted to probate and record in lieu of the original; but in every such case the presumption is of revocation by the testator, and that presumption must be rebutted by proof."

1. The first question presented is, What proof of execution of the will is required by this section of the code? We hold that the execution must be proved by three subscribing witnesses, if in life, and within the jurisdiction of the court, as in case of probate of a will in solemn form.

2. But it is insisted that the contents of the will must also be proved by three witnesses, and that the presumption of revocation which is raised by law must be rebutted by three witnesses. We do not think this a fair construction of the statute. If we construe it literally, as counsel for plaintiff in error insists, we must require the copy to be clearly proved by the three subscribing witnesses and other evidence. We cannot suppose the legislature intended to require the execution, the contents, and the facts necessary to rebut the presumption of revocation, all to be proved by the subscribing witnesses and other or additional evidence. Again, it must not be forgotten that this literal construction, if enforced, would require each of these facts to be proved, not by three witnesses and other evidence, but by the subscribing witnesses; no others would do. This would in most cases be an utter impossibility. The three subscribing witnesses might be able to prove the execution of the will, and three other equally credible witnesses might have seen the will destroyed since the death of the testator, and still three others might have read the will, and might be able to swear to its contents. But the literal construction of the statute would, with this conclusive evidence in court, reject the probate, because the subscribing witnesses might not know material facts which others in court would clearly prove. In our opinion, the true construction is, that the execution of the will must be proved, as above stated, by the subscribing witnesses; and the destruction or loss of the will, and the facts necessary to rebut the presumption of revocation by the testator, may be proved by such "other evidence" as satisfies the conscience of the jury that the will so executed, as testified to by the subscribing witnesses, was lost or destroyed since the death of the testator, or without his consent before his death. Indeed, it very rarely happens that the three subscribing witnesses hear the

will read, or know anything of its contents. And on the other hand, it frequently happens that some friend of the testator does know the contents of the will, who is not a subscribing witness, while others may know what disposition has been made of the will since the testator's death. The construction we adopt seems to us to be the rational one, while the literal construction contended for seems not only to be absurd, but to defeat the will of the legislature by adhering too closely to the language used by it. The maxim applies, *Qui hæret in litera hæret in cortice*. We have said the evidence must be such as to satisfy the conscience of the jury. It should be very clear and strong: 2 Greenl. Ev., sec. 688. But as in all other cases where it is in conflict, the jury must be the judges of the credibility of the witnesses.

3. If there is evidence to sustain the verdict, under the rules above laid down, a new trial will not be granted. We are not prepared to set aside the verdict in this case for want of evidence. There is much conflict in the testimony which cannot be reconciled. But we think, after an attentive perusal of it, voluminous as it is, that it preponderates in favor of the verdict. And as the jury, whose province it was to weigh it in connection with the credibility of each witness, have pronounced upon it, and the court below has refused to set aside the verdict, we will not interfere with it.

Judgment affirmed.

WILL WHICH HAS BEEN LOST OR DESTROYED AGAINST OR WITHOUT the testator's knowledge or consent may be proved as his will, whether the loss or destruction took place prior or subsequent to his decease, and the fact of such loss or destruction may be proved as well by circumstantial as by positive evidence: *Schultz v. Schultz*, 91 Am. Dec. 88, and note. One witness is sufficient to prove the contents of a lost will: *Dickey v. Malechi*, 34 Id. 130. Contents of improperly destroyed will, satisfactorily proved, may be established as a will, but it must be established by the clearest and most satisfactory evidence: *Rhodes v. Vinson*, 52 Id. 570, and notes.

EQUITABLE JURISDICTION TO SUPPLY LOST OR DESTROYED WILL: See *Townsend v. Townsend*, 94 Am. Dec. 184, and note.

IF WILL IS LOST OR DESTROYED after the death, or without the consent, of the testator, a copy thereof, duly proved by the subscribing witnesses and other evidence, may be admitted to probate and record in lieu of the original, but in such case the presumption is of revocation by the testator, and this presumption must be rebutted by proof, which must clearly satisfy the conscience of the jury, either by the subscribing witnesses or other testimony. In case of conflict, the jury must decide, and where there is evidence to sustain the verdict in such case, a new trial should not be granted: *Burge v. Hamilton*, 72 Ga. 624, citing the principal case.

WOOTEN v. WILKINS.

[30 GEORGIA, 222.]

UNLESS IN FINDING OF JURY THERE IS EVIDENCE OF PASSION, PREJUDICE, OR MISTAKE, showing a misuse of their power, their finding will not be disturbed.

DYING DECLARATIONS ARE ONLY ADMISSIBLE IN CASES OF HOMICIDE, and then only when the declarations are of the circumstances attending the act producing the injury.

DYING DECLARATIONS OF WOMAN, WHO DIED IN CHILDBIRTH, that defendant in an action for her seduction was the father of her child, are not admissible in evidence against him.

ACTION for the seduction of the plaintiff's minor daughter. At the trial, plaintiff offered to prove the dying declarations of this minor, who died in childbirth, stating who was the father of her child. The court refused to receive this evidence, which refusal is now assigned as error.

Samuel D. Irwin, for the plaintiff in error.

Doyal and Nunnally, for the defendant in error.

By Court, McCAY, J. We will not disturb the verdict in this case. There may be some reason from the testimony to think that the defendant is the guilty party, but, as we have had occasion frequently of late to remark, this court is no jury, nor does it have jurisdiction over questions of facts decided by a jury, unless that decision be so manifestly wrong as to make it illegal. This is not such a case; the testimony is not decided and clear either way, and the jury might well have found as they did.

1. Our brother Irwin, who argued this case, took a deep interest, as was right, in seeking the punishment of one who, as he thinks, had wronged his servant; but the jury have not considered his evidence strong enough to authorize a verdict for him, and with the proof as it is, we cannot help him. The province of the jury is to decide upon the facts; and unless there be evident mistake, passion, or prejudice, so as to satisfy us that the jury have misused the power placed in their hands, we will not misuse the power placed in our hands to disturb their finding.

2. We think there was no error in the judge in refusing to admit the statements of the girl made in view of death. The rule has been well settled in England, time out of mind, that dying declarations are only admissible in a case of homicide, and when there is a criminal proceeding against the slayer,

and "the declarations are of the circumstances attending the act producing the injury": *King v. Dingler*, 2 Leach, 561; *Hazel's Case*, 1 Id. 378; *King v. Strange*, 2 Barn. & C. 605; *Wilson v. Boerem*, 15 Johns. 286; *Rex v. Lloyd*, 4 Car. & P. 233.

In the two cases, *Aveson v. Kinnaird*, 6 East, 188, and *Wright v. Litter*, 3 Burr. 1255, one stands on the ground of *res gestæ*, and the other upon the ground of "the declarations of a person since deceased, against his interest," and are admissible as such: Code of Georgia, sec. 8723.

Both these cases are the statements of persons as to their own guilt, and are strongly contrary to their own interest, as well as deeply mortifying to their pride.

The case read from North Carolina, *McFarland v. Shaw*, 2 Car. Law Repos. 102, is, we admit, in point. But, much as we respect the court which made it, we do not feel authorized to adopt it. It is directly contrary to the whole current of authority. This is by no means a new question; it has often been made before, and so far as we have been able to discover, the case in North Carolina stands alone. We will not say that there is not, perhaps, as much reason for admitting the evidence in a case like this as in one of a homicide. But when a rule has been well settled, we deem the fact that it is not consistent with principle, or with other rules, no reason for the courts to set it aside. Courts ought not to make law. That is the province of the legislature. They only interpret and declare the law, and though we doubt not the court in the North Carolina case was doing what it thought a good work in straining a point to catch a guilty person, we think they erred. Had they said the rule they laid down ought to be the law, we might, perhaps, agree with them, but we do not agree that it is the law, and we think the authorities are uniform to the contrary.

Judgment affirmed.

DYING DECLARATIONS ARE ONLY ADMISSIBLE IN CASES OF HOMICIDE, where the death of the deceased is the subject of the charge, and the circumstances of the death the subject-matter of the declarations: *Daily v. New York etc. R. R.*, 87 Am. Dec. 176, and note.

IN CIVIL CASES, DYING DECLARATIONS ARE NOT OF THEMSELVES ADMISSIBLE IN EVIDENCE: *Daily v. New York etc. R. R. Co.*, 87 Am. Dec. 176; *Barfield v. Britt*, 62 Id. 190, and note. See the very extensive note to *Peeples v. Vernon*, 95 Id. 49.

JONES v. MORGAN.

[39 GEORGIA, 310.]

PLAINTIFF'S ATTORNEY MAY CONTINUE SUIT AGAINST DEFENDANT TO RECOVER AMOUNT OF HIS FEE AFTER PLAINTIFF HAS DISMISSED. Where in an action of trover plaintiff and defendant fraudulently settle the same with notice of the lien of attorney for plaintiff for his fee, such attorney has the right to prosecute the suit against defendant to recover the amount of the fee, provided the plaintiff is entitled to recover anything from defendant upon the trial.

ACTION to recover certain slaves, or their value. When the case was called for trial, defendant's counsel moved to dismiss it under that provision of the constitution prohibiting courts to in any manner deal with matters relating to slaves or slave-hire. Plaintiff's counsel resisted this motion upon the ground that plaintiff and defendant, with notice of his fee, had fraudulently settled the case, and he insisted that the case should be tried. He also denied the application of the constitution to cases which arose before its adoption, or to actions *ex delicto*. The case was dismissed, and this is the error assigned.

Hawkins and Burke, and N. A. Smith, for the plaintiff in error.

Scarborough, for the defendant in error.

By Court, **WARNER, J.** It appears from the record in this case that an action of trover and conversion was pending in the superior court of Sumter County, for the tortious conversion of certain negro slaves in the year 1850, and that the plaintiff and defendant had fraudulently settled said suit with notice of the claim of the plaintiff's attorney's lien for his fees due in said case, and on motion of defendant's counsel the court dismissed said suit for want of jurisdiction under the provisions of the constitution of 1868, against the objections of the plaintiff's counsel. According to my individual views upon the question of jurisdiction in this case, I have no difficulty in maintaining it, for the reasons expressed in my dissenting opinions in the cases of *White v. Hart and Davis*, 39 Ga. 306, and *Berry v. Montgomery and West Point R. R.*, 39 Id. 554, decided during the present term of the court. This court, however, concurs, in this case, in holding that the counsel for the plaintiff had the right to prosecute the suit against the defendant to recover the amount due him for his fees, provided the plaintiff in his action is entitled upon the trial thereof to recover anything from the defendant, and that the court below

erred in dismissing the case: See *Gray v. Lawson*, 36 Id. 629. Let the judgment of the court below be reversed.

THE PRINCIPAL CASE IS CITED IN *Twiggs v. Chalmers*, 56 Ga. 232, where it is held that where an attorney's fee is payable by special contract out of the proceeds of a suit, the counsel has an inchoate lien on the property in suit for his fee, as soon as the action is commenced, and the client has no right to defeat the lien by dismissing the action before trial, against the objection of counsel, without first paying the fee.

THOMAS v. MALCOM.

[39 GEORGIA, 323.]

IMPROVEMENTS. — In action for mesne profits against bona fide possessor, under claim of right, he should be allowed for improvements made by him to the extent that they have increased the value of the premises, and he will not be restricted to the value of the improvements themselves.

COURTS GO VERY FAR, IN UPHOLDING JUDICIAL SALES, in presuming that officers executing their process have performed their duty, especially after great lapse of time.

PRESUMPTION IN FAVOR OF VALIDITY OF ANCIENT FL. FA. — To support a sale of land in Lee County, a *fl. fa.* issued by a justice's court of Morgan County was introduced. It was backed on the 28th of October, 1831, by another justice, but for what county does not appear, and was levied the next day upon land in Lee County by a constable of that county. *Held*, that under the circumstances it would be presumed that the justice was a justice of Lee County.

THE opinion presents the case.

Lyon and De Graffenreid, for the plaintiff in error.

Scarborough and W. A. Hawkins, for the defendant in error.

By Court, WARNER, J. The error assigned to the judgment of the court below, in this case, is the overruling the motion for a new trial upon the several grounds stated therein. It is the unanimous judgment of this court that a new trial should be granted, on the ground that the court below erred in ruling out the defendant's evidence in regard to the increased value of the premises, resulting from the improvements made thereon by the tenant, as a set-off against the mesne profits thereof claimed by the plaintiff. Section 3416 of the code declares that "a trespasser cannot set off improvement in an action brought for mesne profits, except when the value of the premises has been increased by the repairs or improvements which have been made. In that case the jury may take into

consideration the improvements or repairs, and diminish the profits by that amount, but not below the sum which the premises would have been worth without such improvements or repairs." Section 2855 of the code declares that "against a claim for mesne profits, the value of improvements made by one *bona fide* in possession under a claim of right is a proper subject-matter of set-off." The point in the case is, whether the defendant ought to have been allowed to prove upon the trial the increased value of the premises in dispute, resulting from the improvements made thereon by him, or whether he should have been restricted to the actual value of the improvements and repairs, without regard to the increased value of the premises in dispute as resulting therefrom. If a trespasser can set off improvements which have increased the value of the premises against the mesne profits, surely one who is *bona fide* in possession of the premises sued for, under a claim of right, should be allowed to do so under the restriction specified in the latter part of section 3416.

The chief justice is of the opinion that the court below erred in not ruling out the justice's court *fi. fa.*, which was levied on the land by a constable in Lee County, because the *fi. fa.* was not backed by a justice of that county. I am of the opinion that the court below did not err in admitting the justice's court *fi. fa.* in evidence, upon the statement of facts as presented by the record. This *fi. fa.* was an ancient document, and the sale took place under it in February, 1832. The two last entries made on it are as follows: "October 28, 1831. This is to any lawful officer, to execute and return. John A. Burk, J. P." The county in which this official act of the justice was done is not stated, but on the next day thereafter, the *fi. fa.* was levied upon the land in dispute by a constable of Lee County, in the following words: "Georgia, Lee County, October 29, 1831. Levied the within *fi. fa.* on lot number 43, in the seventeenth district of this county; the property pointed out by the plaintiff. Levi Spencer, Constable." In view of the fact that the *fi. fa.* was backed the day before the levy of the constable of Lee County was made on the land, I think it is a fair legal presumption, especially after such a lapse of time, that Burk, the justice who backed the *fi. fa.* was a justice of Lee County; the constable would not have been authorized to execute it unless it had been so backed, and yet he did execute the same, and returned it to the sheriff, who sold the land. In the case of *Hollingsworth v. Dickey*, 24 Ga. 434,

this court held that it would presume that an entry on a justice's court *fi. fa.* in these words: "No personal property to be found, to levy this *fi. fa.*," was made by a constable of the county where the defendant resided, and where the judgment was obtained, though it was not mentioned by the constable who made the entry in what county it was made. This court (as, indeed, all courts do) has gone very far in presuming that all officers have performed their duty, in upholding judicial sales made by them under the process of the courts, especially when a great length of time has intervened.

There were several other points made in the record besides those specially noticed heretofore, but we find no error in the rulings of the court below upon them. Let the judgment of the court below be reversed.

BROWN, C. J. (concurring). I agree with the judge delivering the opinion in the judgment of reversal for the reason given by him. I am also of opinion that the judge of the superior court should have ruled out the justice's court *fi. fa.* on the trial, on the ground that it issued from a justice's court of Morgan County, and was levied upon land in Lee County, when it had not been backed by a justice of the peace of said county, so as to authorize a constable of that county to make the levy.

While I would make every reasonable presumption in favor of a sale under an old justice's court *fi. fa.*, I do not think we are justified in presuming that a justice of the peace, who backed the *fi. fa.* without specifying for what county he acted, belonged to, or was a justice for, any particular county.

REGULARITY OF SHERIFF'S SALE IS PRESUMED, and the presumption is not rebutted by the silence of the sheriff's deed as to whether there was an *alias fieri facias*, or a *venditioni exponas*, in the absence of evidence *alunde* by the attacking party: *Childs v. McChesney*, 89 Am. Dec. 545. Courts will presume that officer has performed his duty. So held where the record is silent as to whether a constable gave due notice of a sale or not: *Culbertson v. Mülhollin*, 85 Id. 428. When presumption that officer has done his duty not indulged, see *Keane v. Cannovan*, 82 Id. 738; *Piel v. Brayer*, 95 Id. 699.

PRESUMPTION WILL BE INDULGED, where it appears that coroner has executed process, that the facts existed justifying such service: *Kirk v. Murphy*, 67 Am. Dec. 640.

RULE OF ADJUSTMENT BETWEEN IMPROVEMENTS AND MEANE PROFITS. — The principal case is cited and followed on this point in *Basemore v. Davis*, 55 Ga. 520; *Gardner v. Granniss*, 57 Id. 559; *Jenkins v. Means*, 59 Id. 59; *Willingham v. Long*, 47 Id. 545.

BROWN v. CROWLEY.

[39 GEORGIA, 376.]

SELLER OF LAND, PROCURING THIRD PERSON HOLDING LEGAL TITLE TO MAKE DEED, LIABLE AS GRANTOR. — Where a person who has purchased land, but has not yet procured a conveyance, desires to sell it to another, and when he proceeds to do so, suggests that, to save writing, the purchaser take a deed directly from the person holding the legal title, which suggestion is adopted, and it afterwards transpires that there was a mortgage on the land, which the purchaser had to pay, he can recoup this amount upon a note which he has given to the person from whom he has purchased, and who induced him to take the conveyance from the third person.

ONE WHO SELLS LAND, AND INDUCES HIS PURCHASER TO TAKE DEED FROM THIRD PERSON holding the legal title, may be shown by parol testimony to have been the real grantor, and will be held to all the obligations attached to that relation, including an obligation to make a good title.

THE opinion states the case sufficiently.

Hill and Candler, for the plaintiff in error.

William Ezzard, for the defendant in error.

By Court, McCAY, J. The evidence in this case is very strong that both these parcels of land were sold by Brown to Crowley, and that the note sued on is a part of the consideration. It is true, Brown denies this, and says that as to the Hightower land he avowedly only acted as agent. But this is contradicted by Crowley, and is wholly inconsistent with the facts stated by Stewart, who drew the deeds, as well as by the recollection of Wright, that the one-thousand-dollar note was payable to Brown. Stewart directly corroborates Crowley, and says that when they came to have the deeds written, Brown suggested that it was unnecessary to have two deeds to the Hightower land, which he had previously bought, but had not got the deed, as a deed directly from Hightower to Crowley would be sufficient. The jury were not only justified, but bound to find for the defendant under the evidence; the justice and equity of the case is clearly that way, and a new trial ought not to be granted, unless there be some stubborn rule of law which requires a verdict for the plaintiff.

It is contended that, under the statute of frauds, the evidence that this note was given, as set up by the defendant, is illegal, as it all rests in parol; that it also contradicts the deeds made at the time, and that, according to his own showing, Crowley agreed to rely on Hightower's warranty, and as a consequence waived any obligation from Brown. We think

neither of these views controlling. There was no intention of Crowley to waive anything. He had bought from Brown, at his suggestion; and by the advice of the scrivener, that it would do just as well, he took a title direct from Hightower, merely to save writing. It was thoroughly understood that this was with the belief that it would do just as well as if two deeds were to be made. It has not done just as well. The intent was to give Crowley a good and sufficient title. By Brown's suggestions he failed to get it, though both he and the writer of the deed thought the paper drawn answered every purpose that a deed from Hightower to Brown, and a deed from Brown to Crowley, would have done. If Brown knew this mortgage was upon the land, then his conduct was a fraud upon Crowley. If he did not know it, then he, as well as Crowley, acted under a mistake, and it is contrary to equity to permit him to take advantage of it. He was bound to make Crowley a good title, and Crowley has not, with any intent so to do, waived the obligation. In the defense of a note, the defendant may, in this state, set up at law any defense that would be good in equity. Without doubt, if Crowley took the deed direct from Hightower, with the belief that it was just as well, and he was mistaken as to the fact, equity would relieve him, as against Brown, from the consequences of this mistake.

This same line of reasoning is a reply to the other positions. If Brown was guilty of a fraud, or if the parties acted under a mistake of fact, equity will not refuse to interfere because it is necessary to resort to parol evidence. In the search after fraud, or to correct mistakes, the rule that deeds speak for themselves, and that contracts in reference to land must be in writing, does not obtain, and in a case like the present, under our law, the parties stand just as though there was a bill filed. The case is simply this: Crowley buys the land from Brown, and gives his notes. Either by a fraud of Brown, or by a mistake of fact, to save two deeds, Crowley takes a deed from Hightower, Brown saying that such a deed would answer the same purposes as a deed from Hightower to him and then a deed from him to Crowley. It turns out that in fact there is a mortgage on the land, given by Hightower, which Crowley has to pay. It seems to us the clearest equity that, in this state of facts, Crowley may have the amount recouped against the note still in Brown's hands and now sued on.

Judgment affirmed.

ACTUAL VENDOR OF LAND WHO PROCURES THIRD PERSON HOLDING LEGAL TITLE to make the conveyance is entitled to the privileges of that relation. So held in this case, where she was permitted to enforce a vendor's lien: *Russell v. Watt*, 93 Am. Dec. 270.

SMITH v. GRANBERRY.

[39 GEORGIA, 381.]

EXECUTOR'S CONTROL DOES NOT TERMINATE WITH POSSESSION OF TENANT FOR LIFE, but after her death he may take possession of the estate, with its increase, and administer it in accordance with the will, and for this purpose the court of ordinary has jurisdiction.

PURCHASE BY EXECUTOR AT HIS OWN SALE IS NOT VOID, BUT VOIDABLE AT ELECTION of those interested, within a reasonable time, and his possession under such purchase by himself or tenant becomes adverse from its date.

TENANT OF EXECUTOR WHO PURCHASED AT HIS OWN SALE, and is in possession under such purchase, cannot change his landlord by attorning to the executor's successor in the trust, and thus rob the executor's possession of its adverse character.

LANDLORD AND TENANT — ESTATES OF DECEDENTS. — Where an executor purchased land at his own sale, which he leased to a tenant, and then settled upon his wife by marriage settlement, upon his death his tenant becomes the tenant of his wife, and the administrator *de bonis non* of the estate cannot interfere in any way with a proceeding by her against the tenant for holding over, as such proceeding does not in any manner prevent his bringing the proper action for the recovery of the land.

The opinion contains a sufficient statement of the case.

Lanier and Anderson, and R. P. Trippe, for the plaintiff in error.

Cabaness and Peebles, for the defendant in error.

By Court, BROWN, C. J. 1. The will of James Hogan gave to his wife during her natural life all his estate, both real and personal, and at her death the estate, with the increase, to be equally divided, and "one half given by his executor" to the lawful heirs of the body of one of his daughters, and the use of the other half to his other daughter during her natural life, and at her death to go to the lawful heirs of her body. The will then contains this clause: "If my wife should at any time think proper to give any portion of my estate thus bequeathed to the legatees above named, I wish her to do so only at her own discretion, through and by my executors." Held, that the assent of the qualified executor to the life estate of Mrs. Hogan did not divest him of further control over the estate. But at

her death it was the right and duty of the executor to take possession of the estate with its increase, if any, and to administer it according to the directions in the will; and as there were no specific legacies, the ordinary, on the application of the executor, had jurisdiction to order a sale for the purposes of distribution, in conformity to the will, the vested interest of each remainderman being an interest in a certain proportion of the estate, and not a vested interest in any particular tract of land, or piece of personal property.

2. The executor, after the death of the widow, having taken possession of the lands of the estate, and having obtained an order from the ordinary for the sale of the same for the purpose of distribution among the legatees, and after legal advertisement, he having sold the same at the proper time and place, and having, through Hollis, purchased the land at his own sale, and after making a deed to Hollis, the land, on the second day thereafter, having been reconveyed to him by Hollis by regular deed. Held, that the purchase by the executor was not void, but was only voidable at the option of the legatees, provided they so elected within a reasonable time. And the executor, after said sale, having claimed and occupied the land as his own, thereby acquired an adverse possession of the same, and a tenant placed upon the land by the executor, after his purchase, was his tenant, and such tenant could not change his landlord by attorning to the administrator *de bonis non*, etc., of the estate of Hogan.

3. The executor, after his purchase while he had a tenant upon the land, entered into a marriage contract with the plaintiff in error, and conveyed to her a life estate after his death, in consideration of marriage, without notice to her of the nature of his purchase; the marriage was then solemnized, and in a few months he died, leaving the tenant upon the premises; and his widow commenced action against the tenant for rent, and a proceeding to dispossess the tenant holding over. Held, that the tenant became her tenant on the death of her husband, and the administrator *de bonis non* of the estate of Hogan had no right to interfere in this litigation, or to maintain a bill in equity to enjoin her action against her tenant, the more especially as she resided in Bibb County, and the litigation between her and her tenant was pending in Monroe, where the bill was filed. If he or the legatees of Hogan had paramount title, the litigation between plaintiff in error and her tenant did not in any way interfere with their

right to commence their action of ejectment or other proper proceeding for the recovery of the land.

The foregoing propositions contain the substance of my reasons for the unanimous judgment of the court in this case, which is, that the judgment of the court below be reversed.

McCAY, J. (concurring). If property be demised to A for life, with remainder to B and C, and the executor deliver possession of the estate to A, who enters upon the full enjoyment of the life estate, she holds it for herself and the remaindermen. And any duty (as to divide the estate or the like) put upon the executor by the will, after the determination of the life estate, is a special trust, and forms no part of his duty as executor, and the supervision of it does not belong to the court of ordinary, but to the superior court.

Where one is in adverse possession of land, against the true owner, and rents it to a tenant, avowedly in his character of adverse holder, the tenant cannot attorn to the true owner or deny the adverse possession of his landlord.

PURCHASE BY ADMINISTRATOR AT HIS OWN SALE will not be held void at law where no repayment has been made or tendered of the purchase-money, and no express or actual fraud is shown. But by a proper proceeding in equity, such sales will always be set aside: *Yeackel v. Litchfield*, 90 Am. Dec. 207, and note citing other cases discussing the question fully.

ATTORNMEN TO STRANGER. — Tenant in possession, under one person, cannot accept a lease from a third person, and thereafter claim to hold under him. It is incompetent for a tenant, without the consent of his landlord, to change the nature of his tenancy by acknowledging a third person as his landlord: *Blanchard v. Tyler*, 86 Am. Dec. 57, and note. See also *Franklin v. Merida*, 95 Id. 129.

PURCHASE OF LAND BY ADMINISTRATOR of land at his own sale is not void, but voidable, and may be set aside at the instance of heirs or legatees, if they commence proper proceedings within a reasonable time: *Grubbs v. McGowan*, 39 Ga. 674, citing the principal case.

THE PRINCIPAL CASE IS CITED, in *Tufts v. Du Bignon*, 61 Ga. 328, where it is held that a deed void as to creditors is valid as between the parties, where the vendee is admitted into possession, or recognized as landlord, and the property leased from him; in such case the contract is executed, and will be so treated, when a valuable consideration is paid for the deed, and the fraudulent act was not the sole inducement for the conveyance, but incidental to it.

BRUCE v. CREWS.

[39 GEORGIA, 544.]

PROOF OF HANDWRITING. — The rule requires that a witness called to prove handwriting shall testify from having seen the person write, or from a knowledge of his hand acquired from writings acknowledged by the party.

WITNESS INCOMPETENT TO PROVE HANDWRITING. — A witness called to prove a person's handwriting, who has never seen the party write, and whose knowledge of his hand was derived from having read letters which came to a business house in which he was a clerk, purporting to come from the party, but which letters were not in reply to any letters witness had written or seen written, is incompetent. His knowledge is simply hearsay.

INCOMPETENT TO PROVE HANDWRITING IN MISSING LETTER. — A witness called to prove a copy of a lost letter claimed to have been in the handwriting of a certain person cannot be shown letters already proven to have been written by such person, and testify whether the lost letter was in the same hand. This is not the case of an expert testifying from a comparison of papers all before the court, but a case of educating the witness up to the point of competency.

MUST OFFER TO PERFORM. — In cases of mutual contracts, such as an agreement to haul cotton, and to pay so much per bag for such work, the person complaining of the other's failure to execute must show an offer to perform on his own part.

FINDING OF JURY WILL NOT BE DISTURBED where the case has been properly submitted to them, and their verdict is not manifestly wrong.

ACTION against Crews for failure to haul certain cotton, in pursuance of an agreement by him so to do. The opinion presents the points decided.

Johnson and Montgomery, for the plaintiff in error.

W. T. Gould, for the defendant in error.

By Court, McCAY, J. Handwriting is proven by one who has seen the asserted author of the writing write, or who has in any reliable way become acquainted with the hand. By our code, section 3786, if one testify that he knows the hand, he is competent. How he acquired the knowledge may be inquired into, and the result of the inquiry is for the jury. The witness is competent, his credibility, the character of his knowledge, is a thing of degree. But if the witness do not testify affirmatively, but says that from the knowledge so and so acquired, I am of opinion, etc., then the nature of that knowledge may or may not render him incompetent. In this case the witness does not state that he knew the hand, but says that, from having read letters, etc., he thought, etc. Clearly, in order to be able to know a handwriting so as to

testify on the subject, the witness must have seen the party write, or have read papers expressly or by implication acknowledged by the writer to be genuine: 1 Greenl. Ev., sec. 577.

Had this witness done either? He never saw Crews write. He only professes to have read certain letters, to wit, letters which came to a business house at which he was clerk, purporting to be written by Crews. These letters were not in reply to any letters witness had written or had seen written. What was this but hearsay? The witness knew they were defendant's letters simply because they bore his name, and because the house at which he was clerk recognized them as his. We do not think this is within the rule. There must be some recognition by the assumed writer, and of this the witness must testify of his own knowledge. The witness does not pretend to this, and is insufficient: 1 Greenl. Ev., sec. 577, and notes and authorities there cited.

The effort made in this case was to introduce a copy of a letter which was lost or destroyed, and the proposition was to prove that the copy was a true copy of a letter which the witness, from the knowledge before alluded to, believed to be a genuine letter of Crews. The letter was not proposed to be produced to the jury; all was to depend upon the witness's knowledge. We think the court did right to reject the witness. The knowledge he had was nothing but hearsay, and as he only pretended to know the handwriting of Crews from this hearsay, we do think he was competent.

After failing in this, the plaintiff proposed to show the witness several papers which had been proven before the court to be in the handwriting of Crews, and then ask the witness if the paper he had copied was not, from its resemblance to these writings, also in Crews's handwriting. We agree with the court below that this was also inadmissible. This is not the case of permitting a witness, an expert, to testify from a comparison of papers, all present before the jury. This is a simple case of educating the witness in the presence of the court up to the point of competency. He is asked if certain papers now before the court do not satisfy him that another paper, not before the court, was in the handwriting of Crews.

The rule requires that a witness called to prove handwriting shall testify from having seen the person write, or from a knowledge of his hand acquired from writings acknowledged by the party. The case now proposed is to make him competent from knowledge acquired by seeing writings which

third persons have said under oath were genuine. In our opinion, this does not come up to the rule, and is not sustained by the authorities. Section 3787 of our code requires the writings to be used for comparison to be present to go to the jury, and they must, besides, be submitted to the other party before trial.

The contract relied on here is a mutual one. Crews agrees to haul the cotton, and the plaintiff to pay him so much per bag for so doing. In such cases, before a recovery can be had on either side, there must be proof that the party complaining had offered to perform on his part: 1 Chitty's Pleading, 331; *Tiernan v. Napier*, 5 Yerg. 409; *Cook v. Ferral*, 13 Wend. 285; 1 Saunders on Pleading and Evidence, 212; *Biggers v. Pace*, 5 Ga. 172. There was no such proof in this case, and the verdict of the jury may be supported on this ground, and if that is the case, it is the settled rule of this court not to disturb it.

On the trial, there was a great deal of evidence going to show that Crews was prevented from hauling this cotton by the military authority of the United States. At that time, as the history of the times informs us (and this court will recognize such history), those authorities were the paramount governing power in South Carolina and Georgia. There was evidence also that there was good ground to suspect, indeed we do suspect, that this cotton was cotton that, under the rules enforced by those authorities, was liable to seizure as blockade cotton. It was in fact seized. If this seizure was by the contrivance of Crews, as the plaintiff contended, on false representations, he, Crews, could not justify himself. But much of the evidence goes to show that the seizure was well founded, — that is, that the cotton was blockade cotton. All this was for the jury; they have passed upon it, and found for the defendant, under a fair charge of the court. We do not think the verdict shocks the moral sense, or is so contrary to the evidence as to be conclusively illegal because based on prejudice or corruption. We think there was evidence from which the jury might fairly believe this was blockade cotton, and that the military authorities might have seized it by virtue, not of false, but of true, statements of Crews. We will not therefore disturb the verdict.

Judgment affirmed.

MOST SATISFACTORY PROOF OF HANDWRITING, where writer is incompetent to testify, is by a witness who saw the writing executed, and is able to iden-

tify it; and next to this is the testimony of persons who have seen the party write, or have had access to or possession of his writings. And this latter mode, though it involves a comparison, is not subject to the objection that it is proof by comparison of hands: *Hanley v. Gandy*, 91 Am. Dec. 315, and note.

WITNESS WHO IS SHOWN WRITINGS ADMITTED OR PROVED TO BE GENUINE, and is then asked if other writings shown him are in the same hand, is incompetent to testify, if he had no previous acquaintance with the writing: *Hanley v. Gandy*, 91 Am. Dec. 315, and note.

LETTERS SHOULD BE ADMITTED IN EVIDENCE, when it appears in proof that from correspondence with his firm the witness is acquainted with the handwriting, and that the letters were firm letters, received by due course of mail.

WELCHEL v. THOMPSON.

[39 GEORGIA, 556.]

PENDENCY OF ANOTHER ACTION FOR SAME CAUSE SHOULD BE PLEADED IN ABATEMENT. After the parties have gone to trial on the merits, this plea is waived, and cannot be taken advantage of.

PAROL OR INFORMAL PARTITION — POSSESSION NEED NOT BE FOR SEVEN YEARS TO PERFECT TITLE. — Where commissioners have been appointed to make partition between co-tenants, and they divide the property, but neglect to report to the court, and have the partition confirmed, and the co-tenants take possession of their allotted shares, and make improvements in pursuance of the partition, the title of each is complete, and it is error to instruct the jury that such possession must continue for the full period of the statute of limitations.

THIS was a proceeding for partition commenced by Thompson, to which Welchel pleaded that the land had already been partitioned, and set out proceedings commenced many years previous, in which commissioners had been appointed, had made partition, and had fully complied with the statute, except that they had not reported, and had the court confirm their proceedings. Objections had been filed against this partition, but the matter was settled. The opinion presents the points made.

Wier Boyd and C. R. Simmons, and George Hillyer, for the plaintiff in error.

E. M. Johnson, for the defendant in error.

By Court, McCAY, J. 1. The pendency of the first application ought to have been pleaded in abatement. By going to trial on the merits, this plea was waived, and the defendant below could not take advantage of it on the trial: Code, secs. 2843, 3404. We do not think there was anything in this point.

2. There was very strong proof that there had been a previous division of this land by commissioners appointed by the court, under a partition similar to the present. That return was never actually carried to the court, and made the judgment of the court, but there was a good deal of proof that the present movant acquiesced in the partition, and that each party had occupied adversely and independently the part allotted to him, and had done more or less improvement upon it.

The court, in our judgment, erred in charging the jury that this possession and acquiescence, by each of his part, if such there was, must have continued seven years. We do not think this was necessary. These parties were tenants in common. If the land was divided between them, even by parol or by commissioners, and each accepted his part, went into possession under the division, and made improvements, it was a good division. The possession did not have to continue seven years to be complete. It became complete when possession was taken by each of the part allotted to him, provided this was done pursuant to the partition. Why should this differ from a parol sale of land? We think it stands on just that footing, except that there was no purchase-money. Under the code, sections 1941, 3131, such a possession, as the jury from this testimony might have found to have existed, would have been a good part performance. The court ought to have left it to the jury without the qualification that it must have continued seven years. On this ground, we reverse the judgment.

PAROL PARTITION of lands among co-tenants, when followed by several possession in conformity with the terms of the partition, gives to each the rights and incidents of an exclusive possession of his property. After such a partition, one of the co-tenants may go into equity, and compel a conveyance from the others of the legal title: *Tomlin v. Hilyard*, 92 Am. Dec. 118. Parol partition, if followed by exclusive possession and acts of ownership, will bind the co-tenants and their heirs: *Wood v. Fleet*, 93 Id. 528. These cases seem to imply that the possession need not be for the period of the statute of limitations. The contrary is held in *Ballou v. Hale*, 93 Id. 438, and in the case cited in the note to *Piedmont C. & I. Co. v. Green*, 98 Id. 799. See the notes to these cases.

STEGAR v. STATE.

[39 GEORGIA, 582.]

INDICTMENT FOR ROBBERY MUST STATE THAT PROPERTY WAS TAKEN FROM PERSON OF ANOTHER; to say that it was taken from him is insufficient. PERSON IN ACTUAL POSSESSION OF MONEY HAS SUCH OWNERSHIP THEREOF as makes it robbery to take it from his person without his consent.

THE opinion presents the case.

T. W. Thurmond, and Peebles and Stewart, for the plaintiff in error.

L. B. Anderson, solicitor-general, and A. W. Hammond and Son, for the state.

By Court, BROWN, C. J. Robbery is the wrongful, fraudulent, and violent taking of money, goods, or chattels from the person of another by force or intimidation, without the consent of the owner: Code, sec. 4323. A motion in arrest of judgment was made and overruled by the court below in this case, on the ground that the indictment alleges that the money taken was the property of Mrs. Ann Motley, and was taken from her daughter, Miss Virginia Motley, without the consent of the said Virginia, and that there is no allegation that it was done without the consent of Mrs. Ann Motley, who is charged to be the owner. This might have been a good objection to the bill of indictment on special demurrer, but we are not prepared to say it is good in arrest of judgment. If Miss Virginia Motley was in the actual possession of the money, she had such qualified ownership in it as was necessary to constitute the offense of robbery in any person who wrongfully, fraudulently, and violently took it from her person, by force or intimidation, without her consent. The possession, if legal, constituted the necessary ownership, though there may be a question whether the ownership in her is sufficiently alleged. But we think this judgment should have been arrested upon another ground. It is not alleged that the money was taken from the person of Miss Virginia Motley. The allegation is that it was taken from her, not from her person. This allegation may be strictly true, and there may have been no robbery. Anything taken from the possession of a person may with propriety be said to be taken from him or her. I have a title to my house, and am in the legal possession of it; a thief enters my house, in my absence, and takes and carries away my money; he is guilty of burglary or larceny, but not of robbery, because

I was not present, and the money was not taken from my person. But in usual and correct language, he is said to have taken my money from me, that is,—he took it from my possession.

We hold, therefore, that it is necessary, in an indictment for robbery, to allege that the money or property was taken from the person of another. As this bill of indictment contains no such allegation, it is fatally defective, and the judgment must be arrested.

Judgment reversed.

OWNERSHIP OF PERSON ROBBED.—Thing stolen must be charged to be property of actual owner, or of one having a special property as bailee, and from whose possession it was stolen: *People v. Bennett*, 93 Am. Dec. 551. Property in indictment for larceny may be averred to be in either of two persons, where one has the general property and the other the special property in the thing taken: *Billard v. State*, 94 Id. 317, and note.

INDICTMENT MUST SHOW ON ITS FACE ALL FACTS NECESSARY TO CONSTITUTE OFFENSE CHARGED. In this particular it must be explicit and certain, and leave nothing to inference: *Phippe v. State*, 85 Am. Dec. 654. Indictment for theft must state from whose possession the property was taken, and that it was without his consent: *Garcia v. State*, 82 Id. 606.

INDICTMENT FOR ROBBERY MUST ALLEGE THAT TAKING WAS FROM PERSON: Note to *State v. McCune*, 70 Am. Dec. 181, where the question is fully discussed.

WALLACE v. MATTHEWS.

[89 GEORGIA, 617.]

ADMISSION, RIGHT TO WITHDRAW WRITTEN.—Where a party to an action makes a written admission of facts, simply to save the other party the trouble and expense of getting up the testimony, if he discovers that the admission is not true, he may withdraw it, provided there remains sufficient time for the other party in which to prepare his case, and provided also that such party has not been injured by relying on such admission, as by the death of an important witness.

WHERE COMMON CARRIER RECEIVES GOODS FROM PERSON, AND HE AFTERWARDS SUES CARRIER FOR THEIR LOSS, the carrier will not be allowed to dispute his title by setting up the title of a third person which is not being enforced against it.

COMMON CARRIER CANNOT, BY ANY ACT OF HIS OWN, TO WHICH SHIPPER DOES NOT CONSENT, LIMIT HIS LIABILITY, but the parties may make an express contract for that purpose, and if they both have a fair opportunity to understand the terms of the contract entered into, they are bound by it.

LIMITATION OF CARRIER'S LIABILITY BY BILL OF LADING NOT SIGNED BY CONSIGNOR.—Where defendant's railroad, in consequence of the war, was in a dilapidated condition, and their supply of rolling stock limited,

and they had refused to receive freight for shipment unless upon a qualified liability, to secure which they had printed bills of lading limiting their liability, and where plaintiff, through himself and his agents, had knowledge of the condition of the road and the terms upon which goods were received, and where plaintiff, desiring to ship goods, filled out one of said printed bills of lading and brought it to defendant to sign, he will be held to a knowledge of its contents and an assent to its terms.

COMMON CARRIER IS BOUND TO RECEIVE GOODS TENDERED HIM FOR SHIPMENT, SUBJECT TO HIS COMMON-LAW LIABILITY, unless the shipper sees fit to limit his liability by contract or agreement.

CERTAIN cotton was delivered to the Western and Atlantic Railroad Company for shipment, and they gave a receipt therefor, stating that they had received it from Elliott and Jarnigan, to be delivered, etc., and containing many limitations upon their common-law liability, including an exemption from liability for loss by fire. This receipt was signed by the agent of the road. Some of this cotton was never delivered; its loss by fire was admitted, and Mitchell brought this action to recover its value. Before the trial, Wallace, superintendent of the railroad company, gave to plaintiff's attorney a written statement of facts which the writing stated were admitted for the purpose of saving expense, trouble, and costs. At the trial, the verdict went for plaintiff, and the case was appealed. Long before the trial on appeal, defendant gave notice that said admission was withdrawn, and that thereafter it did not agree thereto. Plaintiff replied that he would insist upon it. The admission was used at the trial over the defendant's objection. Plaintiff at the trial testified he made out the receipt himself and got it signed by the defendant's agent, but that at that time nothing was said about releasing the defendant from liability for loss by fire. No further statement of the case is necessary. The verdict was for plaintiff.

A. W. Hammond and Son, for the defendant in error.

Simpson and Farrow, and P. L. Mynatt, for the plaintiff in error.

By Court, BROWN, C. J. 1. We see no good reason why the defendant in the court below should not have been permitted to withdraw the admissions made by him, simply to save the other party the expense and trouble of getting up the testimony, if it be discovered that they had been made by inadvertence or mistake, or for any other reason were not true, provided there was sufficient time after the withdrawal for the plaintiff to prepare his case for trial. But this would not be

permitted if the plaintiff would be injured by anything that occurred while he relied upon the admission, as in case of the death of an important witness, whose testimony he would otherwise have procured, or the like. This ruling is confined to the class of cases now under consideration, and does not apply to admissions made in the ordinary transactions of life which are governed by well-known rules of evidence.

2. As Matthews, the plaintiff, delivered the cotton to the Western and Atlantic Railroad for shipment, the road will not be permitted to dispute his title in this action, by setting up title in third persons, which is not being enforced against it: Revised Code, sec. 2050.

3. But the important point in the defense set up by the road to this suit remains to be considered. Was there an express contract entered into between the road and Matthews, the plaintiff, limiting the liability of the road as a common carrier? After an attentive examination of this record, we are satisfied there was, and that the rights of these parties must be governed by that contract.

Mr. Dooley, an officer of the road, swears in substance that such was the dilapidated condition of the rolling stock of the road, growing out of the war, then very recently closed, that with the means that could be commanded within the limited time which had transpired, insecurity of freights shipped on the road could not have been avoided by the road, or its officers or employees, and that the work of repair was so great that it could not be done within a month or other limited time. And in connection with this testimony of Mr. Dooley, it must be remembered that the road had been turned over to the officers of the state by the military a very short time before this shipment was made. Mr. Dooley also testifies that Elliott and Jarnigan knew the condition of the road and its rolling stock, and that they were shipping a good deal of cotton at that time. They shipped for a large number of parties who forwarded through them, and that in a conversation with Elliott a short time after this lot of cotton was burnt, he, Dooley, refused to risk the flat-cars to ship cotton, although there was no risk to the road for the cotton, the parties having that insured. Elliott said he would risk the cotton on flat-cars, and insisted on shipping on those cars, when others were not to be had, it being understood at the time that the risk of the cotton was on the insurance companies. But, says Dooley, I told him the road would lose the cars, and I would not let any

more go on flat-cars. After this he continued to ship whenever box-cars could be had, etc.

Dooley also annexes to his answers the form of a receipt or special contract used by the Western and Atlantic Railroad at that time in its shipments, which is a copy of the one used in this case, and a copy of the receipts which Elliott and Jarnigan, as agents of the Tennessee roads running a through-line in connection with the state road, used in their shipments, for persons who sent cotton to them to be shipped over that line. It is an established fact, therefore, that Elliott and Jarnigan knew the condition of the road and of its rolling stock, and knew that its officers refused to make shipments without a contract limiting their liability, and knew that the form of receipt used by the road, and kept by them as agents of the connecting roads, making together with the Western and Atlantic road the through-line, was intended to be used as the evidence of the express contract, limiting the liability of the road as therein specified, and that, among other things, in case the cotton shipped were burnt on the line of the road or at its stations, it was not to be liable.

Thus the matter stood as between Elliott and Jarnigan and the road. Let us next inquire what relation Matthews bore to these parties, and what were his means of knowing the facts. Elliott, in his testimony, says, "he thinks that the plaintiff [Matthews] took the receipt in the firm name of Elliott and Jarnigan. Said firm name was used because the cotton came here [to Atlanta] from West Point, consigned to Elliott and Jarnigan, and Matthews happened to be in Atlanta and attended to it himself, to prevent delay."

This shows that Elliott and Jarnigan were not only the agents of the through line of roads, to solicit shipments, and knew the terms upon which cotton was shipped over that line, but they were also the agents of Matthews, the plaintiff, who consigned his cotton to them for shipment, and had it shipped in their name. This is confirmed by Matthews, who swears that all the cotton he shipped by said railroad was shipped in the name of Elliott and Jarnigan. Then there can be no controversy about the fact that Matthews, by his agents, through whom he shipped his cotton, had notice of the condition of the road, and of the terms on which it received cotton for shipment.

But we are not compelled to rest the case here. We have still stronger evidence that Matthews had notice of the con-

dition of affairs, and agreed to the express contract contained in this receipt limiting the liability of the road in case of destruction by fire, etc. He says, in his answers, "I made out the bills of lading myself, in their name [the name of Elliott and Jarnigan, from whom he got the blanks], and got them signed by the bill-of-lading clerk of the railroad."

I need not multiply quotations from the evidence. Here is an express admission under oath made by the party himself, that he made out the bills of lading and got the agent of the road to sign them. He may in a subsequent examination deny his knowledge of the terms upon which the road was shipping cotton at that time, or of the contents of the receipt, but it cannot avail him. The law charges him with knowledge of the contents of the contract used by his own agents, and filled up by himself, and carried by him to the agent of the road for signature.

Upon these facts, as already stated, we hold that the receipt in this case was the written evidence of an express contract between the plaintiff and the road by which its liability was to be limited, as specified in the receipt.

Taking this view of the rights of these parties, it becomes unnecessary to notice the other points made in the bill of exceptions. The matter of insurance, as well as the loss by fire, are provided for in the written contract, and the court and jury on the next trial will have no difficulty in arriving at a correct conclusion as to the rights and liability of the road under the contract.

It may be proper to remark that there is a clear distinction between the cases made by this record and the cases of *Purcell*, *Newby*, and others against the Southern Express Company, cited in the brief of the counsel for the defendant in error. In no one of those cases was the receipt prepared by the person shipping the goods and tendered to the company for signature. Nor does it appear in any one of them that the shipper did in fact have actual notice of the contents of the receipt given for the goods.

In *Southern Express Co. v. Purcell*, 37 Ga. 108 [92 Am. Dec. 53], which may be said to be the most thoroughly considered of the cases referred to, Warner, C. J., says: "The defendant's liability as a common carrier is regulated by law upon grounds of public policy, and he cannot be permitted by his own act to limit the effect and operation of that law, and thereby defeat the public policy." Again, he says: "But the

common carrier and the shipper may enter into an express contract outside of the receipt given for the goods in regard to the carrier's liability, and then both parties, having a fair opportunity to understand the terms of the contract, will be governed by it."

This language fairly construed, in reference to the case made by the record then before the court, simply means that while the carrier cannot, by any act of his own to which the other party does not consent, limit his liability, the parties may make an express contract for that purpose, and if they both have a fair opportunity to understand the terms of the contract entered into, they are bound by it.

Here both parties had that fair opportunity. The carrier did not limit its liability by its own act alone, but by the consent of the shipper. Nobody was entrapped or deceived. The shipper made out such written contract as he was satisfied with, and carried it to the agent of the road, who signed it, and we hold that he is bound by it.

In the case of *York Company v. Illinois Central R. R. Co.*, 8 Wall. 107, the supreme court of the United States have unanimously held that "the common-law liability of a common carrier for the safe carriage of goods may be limited and qualified by special contract with the owner, provided such special contract do not attempt to cover losses by negligence or misconduct." Thus when a contract for the transportation of cotton from Memphis to Boston was in the form of a bill of lading, containing a clause exempting the carrier from liability for losses by fire, and the cotton was destroyed by fire, the exemption was held sufficient to protect the carrier, the fire not having been occasioned by any want of due care on his part.

In this case the receipt was in the usual form, with a limitation of liability in the following words: "Fire and the unavoidable dangers of the river only excepted." The shipper was examined by interrogatories, and annexed a copy of the receipt to his answers, in which he swore that the cotton was shipped on the steamer belonging to the company before the bills were signed; that he had not examined the bills; that his attention was not called to the fire clause, and that his firm had no authority to ship for their principals with that exemption. Mr. Justice Field, delivering the opinion of the court, says: "Nor do we perceive any good reason, on principle, why parties should not be permitted to contract for a

limited responsibility. The transaction concerns them only, it involves simply rights of property, and the public can have no interest in requiring the responsibility of insurance to accompany the service of transportation in face of a special agreement for its relinquishment. By the special agreement the carrier becomes, with reference to the particular transaction, an ordinary bailee and private carrier for hire."

Again, he says: "But when such stipulation is made out, and it does not cover losses from negligence or misconduct, we can perceive no just reason for refusing its recognition and enforcement."

To avoid misapprehension, it is proper to state that this decision recognizes the doctrine that a common carrier is bound to receive goods tendered to him in his line of business for shipment, and he is liable to a suit for damages for refusing to take them. He cannot screen himself from liability by any general or special notice; nor can he coerce the owner to yield assent to a limitation of responsibility by making exorbitant charges when such assent is refused. But he may, with the assent of the owner, make a special contract in the face of the receipt which will limit his liability. This is the doctrine maintained by the unanimous judgment of the supreme court of the United States, in the last case decided by it which involved this question.

We put our judgment, however, upon the facts of this case, which are clearly distinguishable from the cases decided by this court which were claimed as authority by counsel for the defendant in error.

Judgment reversed.

LIMITATION OF CARRIER'S LIABILITY BY NOTICE: See *Indianapolis etc. R. R. Co. v. Cox*, 95 Am. Dec. 640. He may limit his responsibility by notice, if brought home to the consignor, and assented to clearly and unequivocally by him: *Buckland v. Adams Ex. Co.*, 93 Id. 68. But this assent is not to be inferred from the mere fact that knowledge of such notice on the part of the owner or consignor is shown. The evidence must show that the terms on which the carrier proposed to carry the goods were adopted as the contract between the parties: *Id.* The burden is on the carrier to show a restricted liability, and that a notice to that effect was received or seen by the shipper is not sufficient; his assent must be shown: *McMillan v. Michigan etc. R. R. Co.*, 93 Id. 208.

LIMITATION OF CARRIER'S LIABILITY BY CONTRACT.—Carrier may, by express contract with shipper, limit his common-law liability: *Mobile etc. R. R. Co. v. Hopkins*, 94 Am. Dec. 607; *Squire v. New York Cent. R. R. Co.*, 93 Id. 102; *McMillan v. Michigan etc. R. R. Co.*, 93 Id. 208. But they cannot

contract for an exemption from the consequence of their negligence: *Mann v. Birchard*, 94 Id. 398; *Mobile etc. R. R. Co. v. Hopkins*, 94 Id. 607.

PROVISION IN BILL OF LADING OR RECEIPT LIMITING CARRIER'S LIABILITY. — Presumptions of assent thereto: See *McMillan v. Michigan etc. R. R. Co.*, 93 Am. Dec. 208; *Strohs v. Detroit etc. R. R. Co.*, 94 Id. 564, and notes.

CARRIER IS BOUND TO RECEIVE ALL GOODS TENDERED TO HIM SUBJECT TO HIS COMMON-LAW LIABILITY, unless the shipper see fit to contract with him for a lesser liability: *McMillan v. Michigan etc. R. R. Co.*, 93 Am. Dec. 208.

WITHDRAWAL OF ADMISSIONS MADE FOR PURPOSE OF SUPPLYING PROOF. — Where the parties to an action, or their attorneys, have, for the purpose of saving time and trouble, or for the purpose of dispensing with proof of facts which are uncontroverted, file a written statement that certain facts are admitted, or where, by verbal admission entered upon the record, proof of certain facts is waived, and where they desire afterwards to withdraw such admission, and require the adverse party to fully prove his case, including the facts formerly admitted, the manner of making such withdrawal and the party's right to make it are somewhat unsettled. Mr. Greenleaf says: "The admissions of attorneys of record bind their clients in all matters relating to the progress of the trial of the cause. But, to this end, they must be distinct and formal, or such as are termed solemn admissions, made for the express purpose of alleviating the stringency of some rule of practice, or of dispensing with the formal proof of some fact at the trial. In such cases, they are in general conclusive, and may be given in evidence, even upon a new trial": 1 Greenl. Ev., secs. 186, 205; see also Wood's Practice Evidence, sec. 170; *Holley v. Young*, 68 Me. 215; *Woodcock v. Culais*, 68 Id. 244; *Merchants' Bank v. Marine Bank*, 3 Gill, 96-124; S. C., 43 Am. Dec. 300; *Farmers' Bank v. Sprigg*, 11 Md. 389, 396; *Elwood v. Lannon*, 27 Id. 209; *Marsh v. Mitchell*, 26 N. J. Eq. 497; *Perry v. Simpson*, 40 Conn. 313; *Young v. Wright*, 1 Camp. 139, 141; *Langley v. Earl of Oxford*, 1 Mees. & W. 507. An agreement of facts made and filed in a case prior to the first trial, which, after judgment, was reversed upon appeal, is competent evidence upon a second trial under a *procedendo*: Maryland cases *supra*. For, as is said in *Ellon v. Larkins*, 5 Car. & P. 386: "The former trial is deemed as no trial, and the new trial, being of the same cause, is, therefore, unless such course is pursued, subject to the same admissions."

Upon the question of the withdrawal of admissions made to dispense with proof of the facts admitted, Greenleaf says: "It is only necessary here to add that, where judicial admissions have been made inprovidently and by mistake, the court will in its discretion relieve the party from the consequences of his error, by ordering a repleader, or by discharging the case stated, or the rule or agreement if made in court. Agreements made out of court between attorneys, concerning the course of proceedings in court, are equally under its control, in effect, by means of its coercive power over the attorney in all matters relating to professional character and conduct. But in all these admissions, unless a clear case of mistake is made out, entitling the party to relief, he is held to the admission, which the court will proceed to act upon, not as truth in the abstract, but as a *formula* for the solution of the particular problem before it, — namely, the case in judgment, — without injury to the general administration of justice": 1 Greenl. Ev., sec. 206.

"Express admissions *in judicio* stand as conclusive presumptions of law, and cannot be disputed, unless it is first shown they were made by mistake. No such claim is made, and, under the circumstances, it may be fairly pre-

sumed it would be difficult to maintain it, if made": *Marsh v. Mitchell*, 28 N. J. Eq. 501. "If a defendant desires that admissions made on a former, should not be used on a new, trial, he should take out a summons before a judge to obtain permission to withdraw them": *Elton v. Larkins*, 5 Car. & P. 386. In *Wetherill v. Bird*, 7 Id. 6, defendant at a former trial had made certain admissions which, before a new trial of the case, he gave notice that he intended to withdraw. At the second trial, Lord Denman refused to allow the withdrawal, and said that there was no doubt of its admissibility in evidence. The right to withdraw admissions of this character was made the subject of discussion in *Holley v. Young*, 68 Me. 215, and it was there held that an admission made at the first trial, if reduced to writing, or incorporated into a record of the case, will be binding at another trial of the case, unless the presiding justice, in the exercise of his discretion, thinks proper to relieve the party from it. In *Hargroves v. Redd*, 43 Ga. 150, an admission of this character was sought to be withdrawn during the second trial. The court say: "It appears by the record that the admission sought to be withdrawn was first made in the previous trials of this case. It may fairly be presumed that the propounder has rested on this admission, and has not at hand the proof necessary to supply it. We will not say such an admission may not be withdrawn, but full and timely notice ought to be given, — such notice as would give a reasonable time to the other side to supply the gap its withdrawal makes in his case. This withdrawal was proposed to be made during the trial. We agree with the judge that this was too late, — the notice too short. True, the court might have continued the case, but both the other side and the public have a right that a speedy trial shall be had, and that the time and expense already devoted to the case shall not be lost." These views are approved in *Southwestern R. R. Co. v. Atlantic etc. Co.*, 53 Id. 401. Admissions agreed upon by counsel, as to the facts in a case, will not be allowed to be withdrawn after the position of the parties has been substantially changed, as by the death of a party or a witness: *Wilson v. Bank of Louisiana*, 55 Id. 98.

An interesting case upon this question is *Perry v. Simpson W. M. Co.*, 40 Conn. 313. Upon a former trial between the same parties, the counsel for the defendants had admitted the incorporation of the company and other facts. Previous to a second trial of the case, defendant gave notice that they would insist upon proof of these facts, and that they withdrew their admission. At the second trial, defendant neglected to produce the corporate books of the company, in response to a notice by plaintiff, and the latter offered in evidence the admissions made at the first trial. The court held that, under the circumstances, the admissions did not bind the defendants, nor preclude them from showing the facts to be otherwise; but that they were admissible in evidence, together with the circumstances under which they were made, as tending to prove the facts admitted.

JENKINS v. TEMPLES.

[29 GEORGIA, 655.]

NOT IN RESTRAINT OF TRADE. — Contract not to conduct or carry on a particular business, in a particular town, for a definite and reasonable time, if upon sufficient consideration, is valid.

VALID CONTRACT NOT TO CARRY ON BUSINESS WITHIN CERTAIN TOWN need not contain a provision stipulating the damages which its breach shall occasion. The plaintiff in such case is entitled to recover the actual damage which he has sustained.

DAMAGES FOR BREACH OF CONTRACT NOT TO CONDUCT BUSINESS WITHIN CERTAIN TOWN are not too remote to warrant a recovery. The plaintiff is entitled to recover his actual damages.

THE opinion states the case.

R. J. McCamy, W. Luffman, and W. W. Giddens, for the plaintiff in error.

J. A. W. Johnson, and A. Farnsworth, for the defendant in error.

By Court, BROWN, C. J. We are of opinion that the court erred in ordering this case dismissed, on the ground that the plaintiff could not recover unless he and the defendant "had agreed upon a certain sum as damages for breach of said contract," and on the ground that the damages were "too indefinite and remote." The declaration alleges that plaintiff purchased defendant's stock of groceries "at very high figures or prices," and rented his grocery-house for seventy-five dollars, in consideration that the defendant would not "deal in any of said articles thus billed to petitioner at any place within the corporate limits of the town of Springplace, in said county, until after the expiration of his license, which was taken out on or about the twenty-sixth day of January, 1868, and which was to run for twelve months," and upon the further pledge that said defendant would not open or expose to market in said town of Springplace any one of said articles of merchandise for the time above stated, and that he agreed and bound himself to use all his influence in behalf of plaintiff. The declaration also alleges that the defendant fraudulently, and with design to injure the plaintiff, has set up, in said town of Springplace, a grocery, consisting of the same articles of merchandise of those sold and billed to plaintiff, and is using his influence and sales in opposition to plaintiff.

We are unable to see why this does not constitute a legal cause of action. While a contract in restraint of trade in

general is against the policy of the law, and cannot be enforced, we need not cite authorities to sustain the well-established rule that a party may legally bind himself for a valuable consideration not to conduct a particular trade or business in a particular village, or at a specified place agreed upon by the parties, for a reasonable and definite period of time.

And it is not necessary to enable the party injured to recover for a breach of such contract that he should prove that there were stipulated damages, or in other words, that the parties agreed upon a specified sum as the damage to which plaintiff should be entitled for a breach of the contract by the defendant. The plaintiff in such case is entitled to recover the actual damage which he has sustained. The jury must find the amount, if any, from the evidence submitted upon the trial.

We are equally well satisfied that the position that the damage in such case is too remote to justify a recovery is not well founded. If the plaintiff paid an exorbitant price for the defendant's stock of goods, in consideration of the contract and undertaking which has been violated by the defendant, he would at least be entitled to recover the difference between the price paid and the actual value of the goods at the time of the trade. But this is not all; he may recover any other damage which the jury is satisfied from the evidence has been in fact sustained by him by reason of the failure of the defendant to comply with the contract on his part.

Let the judgment be reversed and the case reinstated.

AGREEMENT IN GENERAL OR TOTAL RESTRAINT OF TRADE is void, though founded on a legal and valuable consideration; but an agreement in partial restraint, restricting it within certain reasonable limits, or confining it to particular persons, if founded on a good and valuable consideration, is valid: *Wright v. Ryder*, 95 Am. Dec. 186, and note. In the note to *Angier v. Weber*, 92 Id. 751, the question is exhaustively discussed.

GARDNER v. KERSEY.

[30 GEORGIA, 664.]

ALLEGATION BY COMPLAINANT, IN BILL FOR INJUNCTION, THAT CERTAIN FACT IS MATTER OF RECORD, does not entitle him to the injunction, unless the allegation is sustained by the record, although it is not denied by the defendant, who pleads that he does not know the facts.

JUDGMENT WILL BE UPHOLD BY EVERY REASONABLE INTENDMENT. — Where recovery is had in ejectment upon four different demises, and one of the lessors was dead at the time, the law will presume that the recovery was had upon the demises of the remaining three.

RECOVERY IN EJECTMENT ENTITLES PLAINTIFF TO POSSESSION OF PREMISES, together with crops growing thereon, unless he has recovered as mesne profits the rent for that year, in which case he cannot claim the crop.

RIGHT TO CROPS IN CASE OF EJECTMENT. — Where one who has recovered in ejectment has recovered rent for that year as mesne profits, he is not entitled to crops growing on the premises. He is entitled to possession, but must allow the tenant ingress and egress to gather and remove the crop. Where he has recovered rent for part of the year, he must divide the crop *pro rata* with the tenant.

INJUNCTION. — Where one who has recovered in ejectment appropriates the crops growing upon the premises after having recovered rent for that year as mesne profits, he is liable for their value to the tenant, but the latter's remedy at law being thus complete, he is not entitled to an injunction against such conversion when threatened.

BILL for an injunction against a writ of possession, and the threatened appropriation of crops growing upon the recovered premises. The opinion states the facts sufficiently.

F. H. West, for the plaintiff in error.

Hawkins and Burke, for the defendants in error.

By Court, BROWN, C. J. 1. The fact whether the recovery was upon the demise of Little alone was matter of record, and should have been determined by the record. And the chancellor was not bound to grant an injunction upon the allegation of that fact by the complainant, unless the allegation was sustained by the record, though it was not denied by the answer of the defendant, who stated that he did not know the fact. In addition to this, the judge who tried the ejectment case, and who is the same to whom the bill for injunction was presented, certifies that he cannot undertake to say upon which of the demises the recovery was had. The plaintiffs in error have brought their cases here, unaccompanied by any copy of the record in the ejectment case, and have gone into the hearing without any suggestion of a diminution of the record. Without the record, it is very clear that we cannot determine a fact upon which the judge who tried the case certifies he

cannot enlighten us. We will not, therefore, control his discretion in refusing to grant the injunction on this ground.

2. It is a well-established rule that the verdict and the judgment of the court is to be upheld by every reasonable intendment. If a recovery is had in ejectment upon four different demises, and one of the lessors is shown to have been dead at the time, in the absence of proof to the contrary, the law will presume that the recovery was had upon the demises of the living plaintiffs.

3. The plaintiff in ejectment who has obtained a judgment for the premises in dispute is entitled, as against the defendants and all persons holding under them, to a writ of possession. And in case the premises recovered are a plantation which has upon it a growing crop, the crop goes with the premises, and the plaintiff is entitled to it, unless he has put in issue and has recovered, as mesne profits, the rent for that year.

4. But if the plaintiff has recovered rent for the year in which the recovery is had, he is not entitled to the growing crop of that year. While he is entitled to be put in possession of the premises, he is bound to allow the tenant ingress and egress to gather and remove the crop. If he has recovered rent for the part of the year up to the time of the trial, and there is a growing crop on the premises at that time, the crop is to be divided *pro rata* between him and the tenant. If the plaintiff in ejectment intends to claim the growing crop, he should be careful not to put in issue or introduce evidence as to the value of the rent for that year. The English rule is that the growing crop passes with the land to the plaintiff in ejectment, and does not belong to the tenant, who is a trespasser from the date of the demise: See Adams on Ejectment, 347; *Hodgson v. Gascoigne*, 5 Barn. & Ald. 88. This is also the rule in several of the states of the Union: See *Cox v. Lacey*, 3 Litt. 334; *Camden v. Haskill*, 3 Rand. 462.

But in England the plaintiff in ejectment did not recover the rents as mesne profits in that action, but was compelled to bring a separate action for mesne profits. Our statute fixes a different rule. With us the plaintiff must recover both the premises and the rent in the same action. It would seem, therefore, that the reason of the English rule does not apply, and that it would be inequitable and unjust to permit the plaintiff to recover rent for the year, and to take possession of the growing crop with the premises.

As the record before us in the equity cause is not accompanied by the record and evidence in the ejectment cause, we do not pretend to determine whether or not there was a recovery of rent for the present year. If there was not, the plaintiff in ejectment was entitled to the growing crop, and the complainant could not sustain this bill. But if the reverse is true, and the plaintiff in ejectment appropriates the crop to himself, and refuses to permit the tenant to gather and carry it away, he is liable in damages, at law, to the tenant for its value.

In this view of the case, which we are satisfied is the true one, the complainant had a full and complete remedy at law, and the judge did not err in refusing to entertain the bill and grant the injunction.

Judgment affirmed.

PRESUMPTION IS IN FAVOR OF REGULARITY OF JUDGMENTS and proceedings of superior courts: *Hahn v. Kelly*, 94 Am. Dec. 742. The court will not presume irregularities to defeat judgment: *Parsley v. Hayes*, 92 Id. 350.

GROWING CROPS ARE PART OF REALTY as between the successful plaintiff in an action of ejectment and the evicted defendant; and if the former is put in possession under his writ, and the latter enters and carries away the crop, the plaintiff may recover from him in trover for their value: *Altes v. Hinckler*, 85 Am. Dec. 407.

VERDIOT IS TO HAVE REASONABLE INTENDMENT, and to receive a reasonable construction, and is not to be set aside, unless from necessity: *Arnold v. State*, 51 Ga. 145, citing the principal case.

PARKER v. MAYOR AND COUNCIL OF MACON.

[39 GEORGIA, 725.]

POWERS AND DUTIES OF MAYOR AND COUNCIL. — Mayor and council of Macon have power and authority to keep the streets, alleys, etc., in good condition; and as public officers, it is their duty to exercise this power, and to keep the streets, alleys, lanes, and sidewalks in such condition that persons passing over and along them may do so with safety and convenience. For their neglect to remove nuisances likely to endanger life or limb, they are liable.

CRUMBLING BRICK WALL LEFT BY FIRE MUST BE TORN DOWN BY CITY AUTHORITIES. — Crumbling brick wall, two stories high, left, after the burning of a house, in an insecure condition, and liable to fall upon the sidewalk, should be pulled down and removed by the city authorities, although it is not in the street; and for their failure so to do, they will be liable for resulting damages.

BRICK WALL LEFT STANDING AFTER BURNING OF BUILDING, if it is strong and solid, may be permitted to stand by the city authorities; and if it is thrown down by a tempest or other act of God, and injures a person,

they will not be liable to him; but if the wall was weak and crumbling, or likely to fall, it is their duty to remove it, and they will be liable for neglecting so to do.

A BRICK wall was left standing upon the line of a street, after the burning of a building, and the wall afterwards fell upon plaintiff, and injured him, for which he brought this action. Plaintiff alleged that the wall was crumbling, and likely to fall, and that it was defendant's duty to have removed it, or to have guarded passengers from danger from its falling. Defendants demurred. It was admitted that the wall was private property, — not in the street, but on the line of the street, — and that the remainder of the wall was pulled down by defendants, upon the complaint of citizens, after the happening of the accident.

A. O. Bacon, for the plaintiff in error.

I. L. Harris and S. Hunter, for the defendant in error.

By Court, *BROWN, C. J.* As the charter of the city of Macon confers upon the mayor and council full power and authority to keep the streets, lanes, alleys, sidewalks, and public squares of the city in good order, and to remove any buildings, posts, steps, fences, or other obstructions or nuisance, which is a power conferred upon public officers for the public good, it is their duty to exercise it, and to keep the streets, lanes, alleys, and sidewalks in such condition that persons passing over or along them may do so with safety and convenience. To this end, it is the duty of the city authorities to remove any nuisance from the streets or sidewalks; and anything that endangers the life of a person passing along the sidewalk is a nuisance which they are bound to abate. As, for instance, a deep pit dug by the sidewalk, so near it that a person passing along the street at night is in danger, by a misstep, of falling into it; anything hanging over the street in such manner that it may fall upon a person passing, and do him a serious injury.

2. But it is insisted in this case that the wall, being private property at the edge of the sidewalk, was not embraced within the objects which the charter gives the city authorities power to remove, as it was not in the street or sidewalk. We think this too narrow a view of the subject. If the city is bound to fill up a pit dug by the edge of the sidewalk, or to fence it off, so that no one may be injured by it, or to remove anything hanging over the sidewalk which may work injury to those passing by, why is it not bound to remove a crumbling wall standing so near the sidewalk as to fall upon it?

In this case, the wall was two stories high, and had stood exposed to the weather for several months after the house was burnt. It was immediately upon the edge of the sidewalk, and could not fall in that direction without falling upon it. And the declaration alleges that it was, from its character and position, insecure, and endangered the lives of passengers upon the street. If so, it was a nuisance which it was the duty of the mayor and council to take the necessary steps to abate; and having failed to do so, they are liable for the damages. Whether the proof upon the trial may sustain the declaration in this particular, we know not, but the demurrer admits, for the purposes of this investigation, that this allegation is true.

It was suggested by counsel for the defendant in error that the wall was not in fact insecure, or in a crumbling or dilapidated condition, but was blown down by a tempest, which caused the injury to the plaintiff of which he complains. This fact, if true, does not appear from the pleadings in the case as it is now before us. If the wall was firm and solid, and did not, under any ordinary circumstances, endanger any person passing by, and it was thrown down by tempest or other act of God, and the plaintiff was injured by the fall, the city is not liable. The court and jury will judge of the character of the wall by the evidence on the trial. We think the rule above laid down fully sustained by the authorities cited in the well-prepared brief of Mr. Bacon, who argued this case for the plaintiff in error.

Let the judgment of the court below be reversed.

LIABILITY OF MUNICIPAL CORPORATION FOR FAILURE TO PERFORM DUTY IMPOSED BY LAW: See *Mayor v. Cullens*, 95 Am. Dec. 398; *Richmond v. Long*, 94 Id. 461; *Nevins v. City of Peoria*, 98 Id. 392; *Chicago v. Powers*, 89 Id. 418; *Stackhouse v. Lafayette*, 89 Id. 450; *County Commissioners v. Duckett*, 83 Id. 557, and notes.

MUNICIPAL CORPORATION MUST KEEP ITS STREETS and sidewalks in such condition that parties passing over them may have safe transit: *Chapman v. Mayor of Macon*, 55 Ga. 568. And in case of failure to do so, are liable to the person injured by their neglect: *Mayor of Savannah v. Waldner*, 49 Id. 324; *Town of Bolton v. Vinton*, 73 Id. 99, all citing the principal case.

MUNICIPAL CORPORATIONS ARE CONFINED to the exercise of powers expressly granted or necessarily implied, and the latter must be so strong as to render it most improbable that the legislature could have entertained an intention contrary to the implication claimed as resulting from the power granted; and some cases hold that it must be impossible to impute a contrary intention to the law-making power: *Frank v. City of Atlanta*, 72 Ga. 432, citing the principal case.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

LINDSEY v. LINDSEY.

[50 ILLINOIS, 79.]

DEED WILL NOT BE SET ASIDE FOR MENTAL WEAKNESS OF GRANTOR, in the absence of undue influence, unless such a degree be shown as rendered him incapable of understanding and protecting his own interests. The circumstance that his intellectual powers were somewhat impaired by age is not sufficient, if he still retained a full comprehension of the meaning, design, and effect of his acts.

BILL in equity. The facts are stated in the opinion.

J. S. Winter, for the appellants.

S. C. Judd and L. W. James, for the appellee.

By Court, **LAWRENCE, J.** On the 27th of January, 1862, Stephen Lindsey, Sen., then eighty-seven years old, conveyed to his youngest son, Hezekiah, his farm in Fulton County, containing 270 acres, and executed to him a bill of sale for three horses, two cows, some hogs, and his farming utensils. At the same time, the son executed to his father seven notes for \$150 each, secured by a mortgage on the farm, and also a bond in the penal sum of \$1,000, conditioned for the support of his father during his life. His father died on the 2d of September, 1864, and a part of the heirs, brothers and sisters of Hezekiah, have filed this bill to set aside said deed and bill of sale, on the ground that Stephen Lindsey, Sen., was, at the time of their execution, mentally incapable of contracting, and that he had been subjected to undue influence on the part of Hezekiah. The defendant answered, denying these allega-

tions in the bill; and the case, having been heard on the bill, answer, replication, and proofs, the circuit court dismissed the bill.

The evidence is quite voluminous, and we cannot undertake to discuss it in detail. An attentive examination of it, however, has satisfied us the court did not err in this decree.

There is no proof whatever that anything was ever said or done by Hezekiah for the purpose of influencing his father to enter into this transaction. So far as appears, he was merely an assenting party, his father having, some eighteen months before this affair occurred, executed two wills, drawn by the witness Bailey, with substantially the same purpose in view that was sought in this transaction, but finally preferring to give the matter this shape. So far as the case depends upon the exercise of improper influence, we must regard it as altogether unsustained by proof.

Was there, then, such mental imbecility on the part of the senior Lindsey as to justify a court in setting aside the deed on that ground alone? Before a complainant can claim such a decree, in the absence of undue influence, he must show such a degree of mental weakness as renders a party incapable of understanding and protecting his own interests. The circumstance that the intellectual powers have been somewhat impaired by age is not sufficient, if the contracting party still retains a full comprehension of the meaning, design, and effect of his acts: Story's Eq. Jur., secs. 235 et seq. Tried by this rule, these instruments must stand. As in most cases of this character, there is a good deal of contradiction in the evidence. It is a family feud, and as the witnesses were testifying to their opinions as to the mental capacity of the deceased, we must expect much contrariety in the testimony. All, however, that appellants can fairly claim to have established is, that Stephen Lindsey, Sen., during the latter years of his life, was subject to occasional attacks of epilepsy, and for several days after an attack he would be disqualified for business. But on the other hand, it is conclusively shown by Bailey, his neighbor and adviser, and by Frisbie, the justice of the peace, who drew the deed, that he was, at the time of this transaction, in the full possession of his faculties, and perfectly cognizant of the meaning and effect of his acts. Bailey, an intelligent witness, went with him from his farm to the village of Vermont, where the papers were executed, and during this drive, while by themselves, the son not being in the sleigh, he

explained his views and objects in making the deed, and the witness testifies, "his mind was as clear as I ever knew it to be." Bailey remained until the transaction was consummated, and his testimony, and that of Frisbie, the justice, are to the same effect, and of a very conclusive character. The testimony of his physician, as to his capacity to transact business when not under the influence of the epileptic attacks, is equally positive. It is, however, upon the testimony of Bailey and Frisbie that we more particularly rely, because the influence of the epileptic attacks is shown to have been only temporary, and their evidence proves that at the time of this transaction he was abundantly able to transact business.

There are cases in which, some degree of mental weakness having been shown, the courts have inferred the exercise of undue influence from the character of the transaction. In the case before us, no such inference is to be drawn. The defendant had come with his family from Missouri in 1856, at the request of his father, to live with him in his old age. He was the youngest child, and the other children had already been assisted by him to a greater extent than the defendant had been, and were in better circumstances. Under these circumstances, it is not evidence of either mental imbecility or undue influence that the deceased conveyed this property to his son for a fraction of its value, taking from him notes secured by mortgage for such sum as he thought equitable, for the benefit of his other children, and a bond for his own maintenance during the remainder of his life.

The decree must be affirmed.

Decree affirmed.

MENTAL WEAKNESS, WHEN SUFFICIENT TO SET ASIDE DEED OR CONTRACT: See *Tracey v. Sacket*, 59 Am. Dec. 610, and note digesting prior decisions in this series; *Hovey v. Chase*, 83 Id. 514, and note; *Dennett v. Dennett*, 84 Id. 97, and note; *Behrens v. McKenite*, 92 Id. 428; *Young v. Stevens*, 97 Id. 592; and see *Hovey v. Hobson*, 89 Id. 705. A deed or contract will not be set aside for the mental weakness alone of the party making it, if he was capable of comprehending the meaning, design, and effect of the act: *Rogers v. Higgins*, 57 Ill. 247; *Uhlich v. Muhle*, 61 Id. 521; *Wiley v. Beak*, 66 Id. 32; *Willem v. Dunn*, 93 Id. 516; *Pickerrill v. Mera*, 94 Id. 226; *Spalding v. Porter*, 100 Id. 292; all citing the principal case.

FARMERS' AND MERCHANTS' INS. CO. v. CHESNUT.

[50 ILLINOIS, 111.]

CONDITION AVOIDING POLICY OF INSURANCE FOR OMISSION OF INSURED to mention existence of wooden building in close proximity to the building insured, is waived by a subsequent adjustment of the loss, and a valid new promise to pay by the company, with a knowledge of the facts.

PROVISION IN POLICY OF INSURANCE REQUIRING SUIT TO BE BROUGHT WITHIN ONE YEAR AFTER LOSS IS WAIVED by an adjustment of the loss, and a valid new promise to pay by the company, upon which the insured relies.

COMPROMISE OF DISPUTED CLAIMS IS BINDING UPON PARTIES as a mutual settlement, so far as the question of consideration is concerned.

AUTHORITY OF AGENTS OF INSURANCE COMPANIES TO BIND COMPANIES IS DETERMINED by the power they are held out by the companies to the public as possessing, and not by written instruments of appointment, of which the public could have no knowledge.

ASSUMPT. The facts are stated in the opinion.

Skinner and Marsh, for the appellant.

Wheat and Marcy, for the appellees.

By Court, LAWRENCE, J. This suit was brought by the assignees in bankruptcy of one David Wigle, to recover the insurance effected upon a stock of goods. The fire occurred in February, 1867, and soon afterwards the company sent an agent to the locality to investigate the facts and determine the amount of loss. The agent estimated it at \$1,852.51, to which Wigle would not agree. Subsequently Wigle went to Quincy, where the company did its business, and renewed his demand for payment. After considerable negotiation, Wigle agreed to take the amount above named, and the proof of loss was made out on that basis, and signed by Wigle. The company, through its secretary, then gave him the following paper:—

W. N. OLIVE, President,	}	Capital, . . \$700,000.00.
H. M. VAN FRANK, Vice-Pres't,		Office of the
W. R. VAN FRANK, Secretary,		Farmers' and Merchants
LEVI COOK, General Agent.		Insurance Co.

QUINCY, ILL., March 11, 1867.

D. WIGLE, Esq., West Point, Ill.

Dear Sir,—Your proof of loss, under policy No. 24,266, is at hand this P. M., and accepted, and will be payable at this office ninety days from this date. Truly,

W. R. VAN FRANK, Secretary.

According to the testimony of Wigle, the company not only gave him this paper, but the secretary and general agent, in

presence of the president of the company, verbally promised to pay him the amount agreed upon in ninety days. They ultimately refused to pay, and this suit was brought.

The declaration contained four counts. A demurrer was sustained to the first, and it was not amended. The second and third counts were based upon the alleged settlement and promise to pay in ninety days, and the fourth was upon an account stated. The company, by way of defense, insists that Wigle, in his application for insurance, omitted to mention a wooden building which stood within a few feet of the building insured, and hence the policy, by its terms, was void. It also insists that suit was not brought within one year after the fire, as required by the terms of the policy, and that the so-called settlement was a mere adjustment of the amount of the loss, and not a promise to pay, binding upon the company. It is urged that such a promise, if ever made, was without consideration, and that the officers alleged to have made it had no power thus to bind the company.

The jury, by their verdict, found the promise was made, and we cannot say this finding was against the evidence. Wigle, whose interest in the controversy had terminated by his bankruptcy, testified positively as to the promise. The secretary and general agent deny it, but the president, on his cross-examination, says he "knew a certain sum had been fixed and agreed upon as the amount to be paid Wigle for his loss, and that Wigle agreed to take it." Wigle is further supported by the written memorandum furnished to him, as above set forth, and which seems to import something more than a mere adjustment of the amount of the loss. We must therefore take the special promise as proven.

Considering then, as we must, that promise to have been made, what effect is to be given to the fact that no mention was made of the wooden building in the application for the insurance? Wigle testifies that after he had signed the written application, he remembered he had made no mention of the wooden building, and went back and told Coon, the agent, about it, and that Coon replied it would make no difference. This is denied by Coon. If true, the company could not defend an action on the policy upon this ground: *Atlantic Ins. Co. v. Wright*, 22 Ill. 474. But whether true or not, the agent of the company was fully advised of the existence of this wooden building before the settlement and promise were made, and even the instructions asked by counsel for the company

assume, if such a promise was made, with a knowledge of all the facts, and if the promise was, in other respects, binding, it would be a waiver of all right of defense growing out of this cause. In conceding this, the instructions for the defendant did not concede too much. If the new promise was made by the company upon a sufficient consideration, and with full knowledge of all the facts, it was sufficient of itself to fix their liability: *Dow v. Smith*, 1 Caines, 32; 2 Phillips on Insurance, sec. 1815.

The same is true in regard to the provision of the policy requiring suit to be brought within a year. It was held in *Peoria Marine and Fire Ins. Co. v. Whitehill*, 25 Ill. 475, that such a provision in the policy was binding, but would be waived if the company deterred the assured from bringing suit by holding out reasonable hopes of an adjustment. *A fortiori*, would it be waived if the company actually makes an adjustment and a new contract to pay, upon which the party relies. This suit is not upon the policy, but upon the new promise, and as to that, the stipulation in the policy has no application.

The case, then, is narrowed down to the validity of the new promise, which the jury found was made. It was not a nude pact, because Wigle claimed that his policy covered certain boots, shoes, and clothing that were destroyed by the fire. This was denied by the company. The question was not free from doubt, but Wigle, for the sake of a settlement, agreed to forego this claim and accept the amount the company was willing to pay. This appears both by his own testimony, and that of the president, and upon the familiar principle applicable to the compromise of disputed claims, was binding upon the parties as a mutual settlement, so far as depended upon the question of consideration. After signing the statement of loss at the amount agreed upon, without fraud, Wigle could not have recovered a larger sum, and his agreement to take that sum was a sufficient consideration for the promise of the company to pay it.

But, it is said, if the special contract was made, the officers making it were acting beyond their power, and certain sections of the charter were read in evidence, providing that the affairs of the company shall be managed by a board of directors, who may appoint an executive committee, which, when the board is not in session, may exercise all the powers of the company, unless forbidden by its by-laws. In this case, Wigle had

come to Quincy, where the chief office of the company was situated, for the purpose of finally adjusting his loss. He there makes a settlement with the secretary and general agent, in the presence of the president, and with his silent acquiescence. These are the officers through whom the business of the company is done. They are held out to the public as its representatives. The policies are executed by them. The official designation of one of them is "general agent," and in that capacity he is advertised by the company to the world. We had occasion in the case of *New England Fire and Marine Ins. Co. v. Schettler*, 38 Ill. 170, to comment on the attempt, not unfrequently made by these companies, to escape their liabilities by denying the authority of their agents, and we here repeat what was in substance there said, that the question in these cases is simply, What power does the company hold out its agents to the public as possessing? In this case, the company read in evidence the written appointment of the agent, Coon, defining his authority. But what mattered it to the public what powers were granted to him by a private instrument of which they had and could have no knowledge? Under the clauses of the charter above quoted, the board of directors or the executive committee had power to appoint an agent and other officers, who should transact the regular business of the company, which would necessarily include the settlement of losses. This is a part of the routine business to be transacted whenever a loss occurs, and to whom could the public look for its transaction but to those officers and agents whose names appear upon the instruments issued by the company, and who represent it to the world? The public knows nothing of the executive committee. In this case, Wigle testifies he was told the committee were to meet, but he was not brought in contact with them. Subsequently, however, to the time when they were to meet, the settlement was made by the officers. The committee thus permitted the officers to act for them, and Wigle had a right to believe they had the requisite power. He acted on that belief himself by reducing the written statement of his loss to a sum which they were willing and agreed to pay, and the company cannot now repudiate the transaction. It was a transaction of such character as necessarily to fall within the general business of the company, and it was conducted with those officers to whom such business is necessarily intrusted, and who are the only persons to whom policy holders can resort for a settlement of their claims.

Objections are taken to the instructions given and refused, but it is unnecessary to discuss them in detail, as they presented the case to the jury in substantial accordance with the views we have here expressed. Special complaint is made of the modification by the court of the sixth instruction asked by the defendant, but without just cause. The instruction as asked was to the effect that the letter read in evidence, and signed by Van Frank, did not of itself amount to a valid promise to pay a sum of money, which the court qualified by adding the following clause: "Unless the jury believe from the evidence that he had authority to write the same." It is objected to the qualification, not that it lays down an erroneous legal principle, but that in this case it tended to mislead, because Van Frank, not regarding the letter as a promise to pay, but merely as an acknowledgment of the receipt of proof of loss, had testified he had authority to write the letter, and it is urged that the jury, applying the instruction to Van Frank's assertion of authority, would be obliged to find for the plaintiff. The answer to this objection is, that the letter is, upon its face, something more than a mere receipt of proof of loss. It is a promise to pay in ninety days, and if made by the authority of the company, would be binding, as stated by the court. If the witness sought to give the letter a narrower meaning than it bore upon its face, and assert his authority to write it, while denying, as he did, that he had authority to promise to pay money, it would be for the jury to give to each part of his evidence such weight as it might deserve. There was at least no error in the instruction. But in view of all the evidence and instructions, it is clear the jury found their verdict upon the belief that there had been a complete settlement with the officers of the company, and that this letter was written in pursuance and by the authority of such settlement; and in this finding we concur.

We are of opinion the case was rightly decided, and the judgment must be affirmed.

Judgment affirmed.

INSURANCE COMPANY MAY WAIVE FORFEITURE RESULTING FROM BREACH OF CONDITION IN POLICY: *Sheldon v. Atlantic F. & M. Ins. Co.*, 84 Am. Dec. 213; *Keeler v. Niagara F. Ins. Co.*, 84 Id. 714; *Ripley v. Aetna Ins. Co.*, 86 Id. 362; *Pino v. Merchants' M. Ins. Co.*, 92 Id. 529; *Hodsdon v. Guardian L. Ins. Co.*, 93 Id. 73; *Horwitz v. Equitable M. Ins. Co.*, 93 Id. 321; *Viele v. Germania Ins. Co.*, 96 Id. 83.

COMPROMISE OF DOUBTFUL CLAIM IS BINDING: *Hoge v. Hoge*, 26 Am. Dec. 52, and note; *Petree v. New Orleans Building Co.*, 29 Id. 448; *Trigg v.*

Read, 42 Id. 447; *Weed v. Terry*, 45 Id. 257; *Tuttle v. Tuttle*, 48 Id. 701; *Comm'rs of Lucas Co. v. Hunt*, 67 Id. 303; *Leach v. Fobes*, 71 Id. 732; *Caswell v. Ross*, 85 Id. 270; *Converse v. Blumrich*, 90 Id. 230; *Pitkin v. Noyes*, 97 Id. 615; compare *Schnell v. Nell*, 79 Id. 453; *Knotts v. Preble*, *post*, p. 514.

INSURANCE COMPANIES ARE BOUND BY ACTS OF THEIR AGENTS within the scope of the authority they are held out to the world as possessing: See note to *Beebe v. Hartford County M. F. Ins. Co.*, 65 Am. Dec. 557; *Gloucester Mfg. Co. v. Howard F. Ins. Co.*, 66 Id. 376; note to *Clark v. Union M. F. Ins. Co.*, 77 Id. 724; *Sheldon v. Atlantic F. & M. Ins. Co.*, 84 Id. 213, and note; *Keeler v. Niagara F. Ins. Co.*, 84 Id. 714; *Horsais v. Equitable M. Ins. Co.*, 93 Id. 321; *Viele v. Germania Ins. Co.*, 96 Id. 83.

THE PRINCIPAL CASE IS CITED IN *Illinois M. F. Ins. Co. v. Archdeacon*, 82 Ill. 239, to the point that, where a loss has been adjusted between an insurance company and a policy-holder, an action can be maintained to recover the balance struck, without bringing suit upon the policy; and in *Stache v. St. Paul F. & M. Ins. Co.*, 49 Wis. 96, to the point that an insurance company cannot avail itself of any breach of warranty in the policy to defeat a recovery upon an agreement to pay the loss, made after the loss had occurred, and after the company had an opportunity to investigate the facts and circumstances affecting the fairness of the loss, without any interference, deception, or fraud, practiced by the insured at the time of such investigation, and especially when the agreement is a compromise of the claim at a less amount than the insured asserts as his true loss.

INSURANCE Co. OF NORTH AMERICA v. McDOWELL.

[50 ILLINOIS, 120.]

OVERVALUATION OF PROPERTY IN APPLICATION FOR INSURANCE WILL NOT AVOID POLICY, where the policy contains no condition to that effect, and where the agent of the insurance company knows or can judge of the value of the property, and accepts the application without objection; although an overvaluation is a circumstance which may be considered, in connection with others, in determining whether the insured destroyed the property for the purpose of defrauding the company, where that is relied upon as a defense.

CONDITION OF POLICY OF INSURANCE THAT NOTICE OF APPLICATION SHOULD BE SENT TO SECRETARY OF COMPANY, is shown to have been sufficiently complied with where the application is indorsed, "Authorized November 5, 1866, at four per cent"; and, at all events, the company is estopped from raising an objection on that ground, where it recognizes the validity of the policy by receiving the premiums, and sending an agent to investigate the loss.

CONDITION OF POLICY REQUIRING CONSENT TO EFFECT OTHER INSURANCE TO BE INDORSED THEREON, is sufficiently complied with, where it is shown that the insurance was effected with the same persons, as agents for the different companies, and that they notified the companies of the fact, and made an entry in the objecting company's book that other policies were applied for and risks taken.

CONDITION OF POLICY OF INSURANCE REQUIRING NOTICE TO BE GIVEN COMPANY OF ENCUMBRANCES ON PROPERTY INSURED, is sufficiently com-

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plied with, where it is shown that its agents had notice thereof, and indorsed on the policy that the loss, if any, would be paid to the persons holding the encumbrances.

INCREASE OF HAZARD ONLY SUSPENDS POLICY OF INSURANCE while it continues, and the liability of the company is restored when it terminates.

NOTICE TO INSURANCE COMPANY OF LOSS IS SUFFICIENT, where it is such notice as induces the company to send its agents to the place to investigate the loss; and, at all events, where the notice is promptly given to the company's local agents.

SUIT ON POLICY OF INSURANCE IS NOT PREMATURELY BROUGHT, where the policy provides that the company shall have sixty days after proof of loss, within which to pay the amount of the insurance, and the suit is brought within the prescribed period.

INSURANCE COMPANY WAIVES OBJECTIONS TO SUFFICIENCY OF PROOF OF LOSS by retaining the proofs, without pointing out specific objections to them.

VARIANCE BETWEEN ALLEGATIONS AND PROOF DOES NOT EXIST where the declaration avers that a contract was made by a certain company, and the evidence shows it was made by the president and directors of the company. The contract is stated according to its legal effect.

CONDITION OF POLICY OF INSURANCE NOT TO ALLOW SMOKING IN PREMISES INSURED is only an undertaking on the part of the insured that it shall not be done with his consent, and that he will use reasonable diligence to prevent it.

CONDITION OF POLICY OF INSURANCE REQUIRES SUBSTANTIAL COMPLIANCE simply.

ACTIONS by McDowell and Brown against the Insurance Company of North America, the Merchants' Insurance Company, and the Lumberman's Insurance Company, on policies of insurance. The cases were considered together.

Hatch and Slade, and Welden and McNulty, for the appellants.

Packard and Dickinson, for the appellees.

By Court, WALKER, J. These three cases present substantially the same questions, and will be considered together. There are minor points in one or two not common to the others, but we shall consider in this opinion all of the questions presented by the several records which we deem material to their determination. Appellees, in the autumn of 1866, purchased of one Burt a steam flouring-mill, in Minonk, Illinois, for the sum of four thousand five hundred dollars, and received a bond for a deed to the property. At the time of their purchase, the property was insured for two thousand five hundred dollars in the La Salle County Mutual Insurance Company, which was not assigned, but was canceled. Appellees, on the second day of November, 1866, obtained a policy

on the property for two thousand dollars from the Lumberman's Insurance Company; and on the sixteenth day of the same month, a similar policy for fifteen hundred dollars in the Merchants' Insurance Company. At about this latter date, appellees commenced the repair of the mill, and after the improvement was completed, they obtained a policy in the North American company for three thousand dollars, and another in the Sangamon Insurance Company for two thousand five hundred dollars; in all, nine thousand five hundred dollars.

During this time, appellees borrowed money of Mrs. McDowell and Joseph Brown, and gave mortgages on the mill to secure its payment, and had given a mortgage to Burt to secure a portion of the purchase-money, and of which the insurance companies had notice through their agents. The mill was destroyed by fire on the 20th of May, 1867. The cause thereof is not shown in the record. After notice to the companies, their several general agents met at Minonk, and investigated the loss and attending circumstances. After the investigation, the agents proposed an arbitration, to which appellees refused to assent. They then promised to pay if appellees would prove that the mill was worth more than the amount for which it was insured. They left blanks for the purpose of making proof, which were filled out by one of the local agents, and as he swears, duly made and forwarded to the home offices.

It is urged that the mill was overvalued at the time the application was made for insurance in these several companies, and that the policies are, for that reason, void, and of no effect. We are at a loss to perceive how such a statement in the application can be material, provided the risk taken is less than its value, or where the value at the time of loss exceeds the amount covered by the insurance. To hold that an overvaluation vitiates a policy, without reference to its value at the time of the loss, would be to hold that a mere diversity of opinion in reference to value might render a policy obtained in the most perfect good faith void, simply because the assured had placed a higher estimate on his property than that fixed by his neighbors. As a matter of prudence and precaution against loss, these companies may, and perhaps do, endeavor to avoid insuring property at more than its value, so as to thereby avoid all temptation to carelessness and destruction of the property. But at the same time, there

is no law prohibiting such bodies from insuring property at its full or even an overvalue. Nor have these companies inserted any condition that an overvalue shall avoid the policy.

Nor can it be said that where the owner is mistaken in the value of his property, and places it too high in his application, he intended to defraud the company. A survey is generally made by the agent of the company, and if regarded too high, and as a matter of importance, the agent should then object. After examination he can, of course, determine whether he regards the value fixed in the application as too high. In this case, the local agent who issued the policies swears that he went through and carefully examined the mill, and we must presume that he had some knowledge of the value of the property, and if it was regarded important by the company to know its value, the agent could have learned it upon inquiry. The agent accepted the application without objection, and received the premiums, and paid them to the companies. It would be unprecedented to permit the companies to receive an application, issue a policy, receive the premium, and then say, We knew that your policy was void when we received your money, and that, whilst you in good faith relied upon the validity of your policy, we knew that we had incurred no risk. And where the agent knows or can judge of the value of the property, and accepts an application without objection, even if the valuation is higher than it should be, we cannot say that it is so far material as to vitiate the policy.

The valuation is not one of the material statements which the assured warrants to be true. It is, however, a circumstance which may, in connection with others, be considered by a jury in determining whether the assured has destroyed his own property for the purpose of defrauding the company, where that is relied upon as a defense. In the case of *Peoria Marine and Fire Ins. Co. v. Lewis*, 18 Ill. 553, it was held that the company was liable to pay the entire loss, unless controlled by the policy; and it has never been held, so far as we are aware, that insurance companies are not liable to pay the amount of their risks, simply because the property was overvalued, but from repairs or other causes had appreciated in value after the risk was taken, so as to become of greater value than the risk when the loss is sustained. They insure to the extent of the sum named, and are liable for that amount if the loss equals or exceeds it.

It is again urged in the case of the policy issued by the

Lumberman's company that it had no notice of the application, and that by one of the conditions of the policy the application was required to be sent to the secretary at Chicago before any risk can be assumed. The application is indorsed, "Authorized November 5, 1866, at four per cent." This would seem to be sufficient proof that the notice had been given; but the company recognized its validity by receiving the premium, and sending an agent to investigate the loss, and it is estopped from raising this objection. Again, as to the failure to indorse consent on the policy to effect other insurance, the application for all the policies were made to the same agents, and they delivered the policies to the assured; and they testify that they notified the different companies of the fact. And it appears the agents entered in the book of the company the fact that other policies were applied for and risks taken. This answers the object and purpose of indorsing consent on the policy fully and in every respect. The only purpose of such an indorsement is to give notice that other insurance on the same property is desired, and to afford the company an opportunity to object. In this case the companies had notice, and no objection was made. Had the application been made to another agent for the policy, it might have presented a different question; but we regard this as a sufficient compliance with the requirement, as it was tantamount to the indorsement.

As to the various encumbrances, the agents were informed of them, and they made the indorsements on the policies that if loss occurred the money would be paid to the persons holding the encumbrances. Thus it appears that the agents had actual notice of both the encumbrances and all the policies, and if they failed to report them to their companies, and afford them an opportunity to cancel the policies, it is the misfortune of those bodies in having negligent agents.

It is likewise insisted that, as to a portion of these policies, appellees, by making repairs on the property after the insurance was effected, had violated one of the conditions which prohibited them from doing any act which should increase the hazard. In the case of *New England Fire and Marine Ins. Co. v. Wetmore*, 32 Ill. 245, it was held that an increase of the hazard only suspended the policy during the continuance of the increased hazard, and when it terminated, the liability of the company commenced. This rule was recognized and applied in the case of *Schmidt v. Peoria Marine and Fire Ins*

Co., 41 Id. 295. If the hazard was increased by making those repairs, it had fully terminated, and the liability had recommenced long before the fire occurred.

There is no force in the objection that the companies did not have sufficient notice of the loss, as they had such notice as induced them to send their general agents to the place to investigate the loss; any notice that produces such a result is sufficient, without reference to its form of particulars. There is no question that the notice was promptly given to the local agents, and that must suffice.

There is no force in the objection that these suits were prematurely brought. The companies had thirty days after notice and proof of the loss within which to determine whether they would rebuild, and sixty days after the proof of loss within which to pay the amount of the insurance. In the case of *Peoria Marine and Fire Ins. Co. v. Lewis*, 18 Ill. 553, it was held, under a similar provision, the company became liable to pay at the end of sixty days from the time the proofs were furnished. More than sixty days had transpired after the proofs were furnished and before these suits were brought, and that is all that is required.

It is urged that the proofs are insufficient which were furnished the companies. They directed them to have the proofs made out and taken by their agents, to whom they furnished blanks for the purpose, and the agents returned them to the companies, and they retained them without pointing out specific objections to them. By such action they waived any objections that may have existed. When they refuse to pay, and yet avoid or fail to afford the insured an opportunity to obviate objections, they cannot rely upon objection to such proof on the trial when sued upon the policy.

In one of the cases, it is insisted that there was a variance between the name by which it is averred the company contracted, and the evidence on the trial. An examination of the record discloses the fact that it is averred in the declaration that the Insurance Company of North America contracted with appellees, when it is shown the contract was made by the president and directors of the company. The averment states the obligation according to its legal effect, and that must suffice. The legal effect is the same, whether it is said the company made the contract, or that it was made by the president and directors of the company. They both mean the same thing.

It is urged that smoking was allowed in the mill, and that appellees, with others, did so, and that it is in violation of the conditions of the policy. In the application it was said that smoking was not allowed. It appears that at one time there was smoking done in the mill, but as soon as appellees were informed that it was prohibited by the policy, it was stopped, and a notice prohibiting it was posted up in the mill. This was some time before the loss occurred. In such a case the assured only undertakes that he will not himself do the act, or allow others to do so, if by reasonable precaution he can prevent it. He does not, by such an answer to the question whether smoking is permitted, insure that it shall not be done, or that if done, he will forfeit his policy. He only undertakes that it shall not be done with his consent, and that he will use reasonable diligence to prevent it: *Daniel v. Hudson Fire Ins. Co.*, 12 Cush. 426. When appellees prohibited smoking, and posted the notice, they did all that was required of them.

It is again urged that an open light was in use in the mill when, in the application, appellees had said they were not in use. It appears that one open kerosene lamp was used in the office of the mill, but it was not used or designed for use in the mill. The miller says that he used it in the mill on one or two occasions, and that it may have been carried through the mill a few times. The lights employed in the mill were not open, but were inclosed in glass. Open lights were not therefore in general use in the mill, nor ever used there. We do not see that the proof establishes a violation of this condition of the policy.

It is urged, with much apparent earnestness, that the judgments in these cases should be reversed because the evidence fails to show that the property was of a value equal to the amount of these several policies. It may be, and no doubt is, true, that if appellants' evidence were alone considered, it would fail to prove that it was worth that sum. But on the other hand, if we were to look alone to that of appellees, it would show it to have been of a larger value than that amount. And where the entire evidence on that question is considered, notwithstanding it is conflicting, we are satisfied that it preponderates in favor of a larger value than the entire sum for which the property was insured. We find in this case, as we usually do where a question of value is involved, that opinions of witnesses, doubtless equally honest and intelligent, differ

widely. Although the evidence is conflicting, still it is sufficient to sustain the finding of the court below.

After a careful examination of these several records, we are unable to discover any error in either of them requiring a reversal of any one of these judgments, and they are therefore affirmed.

Judgments affirmed.

OVERVALUATION OF INSURED PROPERTY, EFFECT OF: See *Borden v. Hingham M. F. Ins. Co.*, 29 Am. Dec. 614, and note discussing the question.

INCREASE OF HAZARD ONLY SUSPENDS POLICY WHILE IT CONTINUES: *Phoenix Ins. Co. v. Lawrence*, 81 Am. Dec. 521.

THE PRINCIPAL CASE IS CITED in *Aurora F. Ins. Co. v. Eddy*, 55 Ill. 217, to the point that where a clause in a policy of insurance provided that smoking shall be strictly prohibited in or about the buildings insured, the mere fact that there may have been smoking therein, but without the knowledge of the insured, and contrary to his directions, will not operate to discharge the company; and in *Insurance Company of North America v. Garland*, 108 Id. 226, to the point that if an insurance company should not, while the insured is in default, exercise its power to declare a policy void under a condition that the insured shall not allow the building to become vacant and unoccupied, and so to remain, and the premises should again become occupied, its right to declare the policy void would cease, and its liability on the policy would again attach.

ST. LOUIS, JACKSONVILLE, AND CHICAGO RAILROAD COMPANY v. TERHUNE.

[50 ILLINOIS, 151.]

VERDICT OF JURY WILL NOT BE DISTURBED by the supreme court, where there is a conflict of evidence.

RAILROAD COMPANY'S OMISSION TO RING BELL OR SOUND WHISTLE AT ROAD-CROSSING, as required by statute, is *prima facie* evidence of negligence.

CASE by James Terhune against the St. Louis, Jacksonville, and Chicago Railroad Company to recover damages for running over and killing two cows, through the defendant's violation of the statute imposing upon railroad companies the duty to ring the bell or sound the whistle upon the engine at the crossing of public highways. The plaintiff had a verdict. A motion for a new trial was overruled, and final judgment rendered upon the verdict. The defendant appealed.

Roberts and Greene, and N. W. Branson, for the appellant.

T. W. McNeely, for the appellee.

By Court, WALKER, J. The question of the weight of evidence was for the jury; and they having determined it, we will not disturb their finding, unless it is not supported by the proof. It is their province to weigh and reconcile the evidence, where it may be done; and if not, then to give it such effect as it is entitled to receive, rejecting such portions as may be unworthy of belief, and giving due weight to such as they may believe to be true. In this case, there was a conflict of evidence as to whether a bell was rung or a whistle sounded for the distance required by law before reaching the road-crossing where the cattle were killed. The jury having found there was not, we are not prepared to hold their finding is not supported by the evidence.

Appellants insist that the court below erred in giving appellee's third instruction. It informed the jury that the omission to ring a bell or sound a whistle at the road-crossing, as required by the statute, was *prima facie* evidence of negligence. In the case of *Galena and Chicago Union R. R. Co. v. Dill*, 22 Ill. 271, it was held that it is a question of fact, to be determined by the jury, whether such an omission is negligence. In that case, the statute imposing that duty on railroad companies had been repealed as to that road, and hence it was a question arising under the common law, whether such an omission was negligence. That case is not therefore an authority in this, as the question presented by this instruction is, whether the omission of a duty imposed by the statute constitutes *prima facie* negligence, or whether in such a case the plaintiff is bound to prove other omissions of duty which constitute negligence. In the case of *Great Western R. R. Co. v. Geddis*, 33 Ill. 304, which was similar in its facts to this, it was held that the failure to ring a bell or sound a whistle at a road-crossing was negligence that should render the company liable for injuries growing out of the omission that might be occasioned by their engines to persons or property; that the omission to perform an act imposed by the statute was negligence. In that case, the cases of *Illinois Central R. R. Co. v. Phelps*, 29 Ill. 447, and *Illinois Central R. R. Co. v. Goodwin*, 30 Id. 117, were referred to and distinguished from Geddis's case. It was said of those cases that the animals were killed at a place where the statute did not require the signal to be given, whilst in Geddis's case the injury to the animal was at a highway-crossing where the signal was required. That case is in point, and must govern this. The

court below did not err in giving this instruction. No error being perceived in this record, the judgment of the court below must be affirmed.

Judgment affirmed.

RAILROAD COMPANY'S OMISSION TO GIVE SIGNALS AT CROSSINGS, AS REQUIRED BY STATUTE, IS PRIMA FACIE NEGLIGENCE: Note to *Baltimore etc. R. R. v. Breinig*, 90 Am. Dec. 63, discussing the question; *Illinois Central R. R. v. Gillis*, 68 Ill. 318, citing the principal case; and see also *Beisiegel v. New York Central R. R.*, 90 Am. Dec. 741, and note; *Ernst v. Hudson River R. R.*, 90 Id. 761, and note.

ZACHARIE v. GODFREY.

[50 ILLINOIS, 186.]

RESIDENT OF STATE ENGAGED IN REBELLION IS NOT TO BE REGARDED AS ALIEN ENEMY, and subject to the disabilities thereof, so that the statute of limitations would be suspended in his favor, where he remained loyal to the United States, and left the state immediately after the commencement of the war, with the intention of returning at its close, his family meanwhile residing there, and resided during the continuance of the war on loyal or neutral ground.

AGREED case. The facts are stated in the opinion.

Billings, Wise, and Sawyer, for the plaintiff in error.

L. and L. Davis, for the defendants in error.

By Court, LAWRENCE, J. This was a suit brought by Zacharie against the administrator and heirs of Benjamin Godfrey, deceased, in the Alton city court, to recover a sum of money alleged to have been owing by the deceased to plaintiff. The estate had been settled, and the object of this suit was to reach property descended to the heirs. The defendants pleaded the statute of limitations, and the court gave judgment in their favor. The record is brought here upon an agreed state of facts, it being admitted that the deceased acknowledged his indebtedness as late as March 13, 1861, and the question being whether the statute of limitations ran against the plaintiff during the late war.

It is admitted that Zacharie resided in New Orleans at the breaking out of the rebellion, and had resided there for sixty years; that on the 24th of August, 1861, he left New Orleans for Cuba and Mexico, to attend to his private business; that prior to January, 1862, he was taken from a British vessel

bound for Matamoras by an American ship of war, and carried to Fort Lafayette, in the harbor of New York; that he was released by order of the government, on the ground of his being a loyal citizen; that he returned to New Orleans in January, 1862, and in February, 1862, he again left that city, engaged in trade between Havana and Mexico, and continued in such trade until after the termination of the war, in 1865, when he returned to New Orleans, where his family had constantly resided, and where was his home. He was loyal to the government, and opposed to secession from the commencement of the war, and in December, 1863, took the oath of allegiance, under the President's proclamation of that year, before the United States consul at Tampico.

On this state of facts, it is urged by plaintiff's counsel that he never lost his residence in Louisiana, and that whatever may have been his personal loyalty, if he had his residence in the hostile territory, he is to be regarded as an alien enemy, and as having been subject to the disabilities of that position. It is further urged that one of these disabilities was the incapacity to sue in the courts of Illinois, and hence our statute of limitations did not run against him during that period.

It is unnecessary to pass upon this last point, as the agreed facts do not sustain the theory that Zacharie was under the disabilities of an alien enemy.

It is true, as urged by plaintiff's counsel, that the supreme court of the United States has decided, in the *Prize Cases*, 2 Black, 635, and in the case of *Mrs. Alexander's Cotton*, 2 Wall. 404, that all persons residing within the hostile territory were liable to be treated as enemies, and the disposition of individuals cannot be inquired into. But the same court, in the *Case of the Peterhoff*, 5 Id. 60, after referring to these cases, says: "But this has never been held in respect to persons faithful to the Union, who have escaped from those states, and have subsequently resided in the loyal states, or in neutral countries; such citizens of the United States lost no rights as citizens by reason of such temporary and constrained residence in the rebellious portions of the country."

The principle here announced governs the case before us. Although the plaintiff, if he left Louisiana immediately after the commencement of the war, with the intention of returning when the war should close, his family meanwhile remaining there, would not be considered, for most purposes, as having lost his citizenship there, or his technical legal residence, yet the

general principle announced in the Prize cases and in Mrs. Alexander's case must necessarily be so qualified as not to apply to a case like this, and the qualification was declared in the case of the Peterhoff. It would be unjust in the extreme to hold that a loyal citizen, leaving the rebellious states at the opening of the war, and having his abode during its continuance on loyal or neutral ground, should be considered as disabled from suing in our courts in consequence of the war which was being waged by the people whom he had left,—a war which he did not approve, and which he had saved himself from the liability of supporting by leaving the hostile territory. If, during that period, he had brought suit in the courts of this state for the recovery of this debt, and had been met with the plea of alien enemy, and, on the trial of that issue, the same facts had appeared which have been disclosed by the present record, no court would have held the plea to be sustained. To have held that loyal refugees from the rebellious states were not entitled to be heard in our courts would have tended to drive them back to the rebellion, while to have permitted them to recover debts that were due to them would not in any degree have conduced to its support, as the money or property recovered would not be brought, by the recovery, within the reach of the enemy, and rendered liable to seizure by him for the maintenance of the war. In such a case, the courts would have inquired, not whether the plaintiff had a legal citizenship in a rebel state at the opening of the war, which he might resume at its close, but where his actual residence was during the war, and whether, if allowed to recover his dues, the probable effect of a recovery would be to place the amount recovered within the reach of the enemy; and if satisfied upon these points, they would not have closed their doors upon a plaintiff, merely because he intended to return to his family and former home after the war should close. We had many men in the North during the war, and some of them in the military and civil service of the government, who, having left their homes and families from apprehension of being forced into the rebel service, were among the most loyal of our people, and it was never supposed our courts must regard them as alien enemies, because of the character of the community whence they came.

Counsel for plaintiff cite *Tucker v. Watson*, 6 Am. Law Reg., N. S., 220, decided by the court of appeals of Virginia, as sustaining their position, but the plaintiff in that case had not

merely his legal citizenship, but his actual residence, in the state of Virginia during the war.

We hold the plaintiff in this record was under no disability to bring suit during the war, and the statute of limitations did not cease to run against him. Whether it would have run had he been an actual resident during the war of a rebellious state, is a question we have not considered.

Judgment affirmed.

ALIEN ENEMIES, WHO ARE: See *Taylor v. Jenkins*, 88 Am. Dec. 773, and note; note to *Cochran v. Tucker*, 91 Id. 280; note to *Dorsey v. Kyle*, 96 Id. 624; *Dorsey v. Dorsey*, 96 Id. 633.

ALIEN ENEMY CANNOT SUE: *Dorsey v. Kyle*, 96 Am. Dec. 617, and note.

ALTON AND UPPER ALTON HORSE RAILWAY AND CARRYING COMPANY v. DEITZ.

[50 ILLINOIS, 210.]

STREET RAILWAY CORPORATION ACCEPTS CHARTER ON IMPLIED CONDITION that it will not injure others by the construction or maintenance of its road.

STREET RAILWAY CORPORATION IS RESPONSIBLE FOR INJURIES TO PROPERTY OF OTHERS, resulting from the defective construction of its road, although constructed, as provided for by its charter, under the ordinances of the city, and the control of the city engineer.

CASE. The opinion states the facts.

Billings and Wise, for the appellants.

L. and L. Davis, for the appellee.

By Court, WALKER, J. This was an action on the case, brought to the September term, 1868, of the Alton city court, by appellee, against appellants. The ground relied upon for recovery is, that appellants wrongfully caused to be constructed, across a gutter on a street in the city of Alton, the track of their railroad in such a manner as to cause a permanent obstruction to the passage of the water when increased by rains, so as to overflow appellee's land; and that, in consequence of such obstruction, the water was flowed back upon appellee's premises, whereby damage was caused to his garden, vegetables, flowers, shrubbery, and seeds. Appellants filed the general issue, and a trial was had before a jury, who rendered a verdict against appellants for \$150. A motion for

a new trial was entered, but it was overruled by the court, and judgment rendered on the verdict.

It appears, from the evidence in the record, that appellee had leased the lots which he was cultivating as a seed-garden, at a rent of one hundred dollars a year. It appears that, prior to the construction of this city railway, this ground was not overflowed, but there was a free passage for the water, and that the railway created an obstruction to its passage and flowed it back on this ground.

The law incorporating this company was adopted at the January session of the legislature in 1867. The sixth section of the act of incorporation declares that the company is authorized to lay down and maintain its railway in, upon, over, and along any street or streets in the city of Alton and the town of Upper Alton, subject to such restrictions as may be imposed by the common council of the city and by the trustees of the town of Upper Alton. An ordinance was adopted authorizing appellants to lay a single track, with necessary turnouts, etc., on the street in question. It provides for the manner in which the track shall be laid, and the culverts constructed; the manner in which the cars shall be propelled, the rate of speed, and declares that the railway company shall be liable for damages to property or person, in operating their road; and the city reserved the right to prescribe, regulate, and alter the grade of the streets of the city without incurring liability to the company for damages.

It also appears that the track of the company was laid under the direction of the city engineer, who gave his personal attention to the matter, and this culvert was constructed according to his directions; that the culvert was not sufficient to discharge the water, as it was constructed.

Appellants insist that, as they constructed their railway track under the ordinances and under the control of the city engineer, they cannot be held liable for this injury. It will be conceded that there was no law requiring them to construct their track. That was a matter of choice, and purely a voluntary act on their part. There was no compulsion, but purely a matter of profit and gain on the part of the company. They accepted the charter with its conditions, and it was for them to determine, before it was accepted, whether, when they complied with the terms and conditions imposed, it would be profitable. Where an incorporated company of this character accept their charter and construct a railway, it is an implied

condition that they will not injure others by its construction or maintenance. If they receive, exercise, and enjoy special rights and privileges over those enjoyed by the community at large, it must be implied that they will respond in damages to all persons injured by the construction or maintenance of their track. And the valuable franchises they receive are certainly sufficient compensation to them for the liability thus incurred; but if they were not, it is a rule that all persons must so use their own as not to injure others.

When the city prescribed the limitations under which the company could lay their track, it was for them to determine whether they would proceed or abandon the enterprise; it was for them to say whether it would be to their present or future advantage to accept the terms, with the liability to damages to others growing out of the terms imposed by the city, and proceed with the work. When they adopted the conditions imposed by the city, and the plans prescribed by its engineer, appellants made them their own. They were free to accept or reject them, and having accepted them, they are responsible for the damages resulting to others by the construction of the road to the same extent and precisely as though the plan had been suggested and carried out by an engineer of their own.

Whether the city or its engineer is liable over to appellants is a question not presented by this record, and we therefore refrain from discussing it.

The judgment of the court below is affirmed.

Judgment affirmed.

"THAT WHICH IS AUTHORIZED BY LEGISLATURE, WITHIN STRICT SCOPE OF POWER GIVEN, CANNOT BE PUBLIC NUISANCE, but it may be a private nuisance, and the legislative grant is no protection against a private action for damages resulting thereupon": Wood on Nuisances, sec. 757, citing the principal case, among others; compare *Hinchman v. Paterson Horse R. R.*, 84 Am. Dec. 252; *Davis v. Mayor etc. of New York*, 67 Id. 186, and notes.

SIMPSON v. WRENN.

[50 ILLINOIS, 222.]

BORROWER OF CHATTEL WILL NOT BE PERMITTED TO SET UP TITLE IN HIMSELF until he has restored the chattel to the lender.

REPLEVIN. The opinion states the case.

E. D. Blinn, for the appellant.

Hoblit and Foley, for the appellee.

By Court, WALKER, J. This was an action of replevin, brought by appellant before a justice of the peace of Logan County, against appellee, to recover a double-barreled shotgun. A trial was had, resulting in favor of appellee, and the case was removed to the circuit court of Logan County by appeal. The case was again tried by the court and a jury, resulting as it had before the justice of the peace. A motion for a new trial was entered, but overruled by the court, and a judgment rendered on the verdict; to reverse which, this appeal is prosecuted.

It appears from the evidence in the record that appellant was a lieutenant in Company B of the Second Illinois Cavalry; that when encamped near Baton Rouge, in Louisiana, he was ordered, with a portion of the men, to attack a squad of the enemy; that in doing so, his men captured a lot of arms, and that when they came to be turned over to the provost-marshal, that officer gave the gun in controversy to appellant. Appellee claims that he had purchased the gun of another member of the company, who was on the expedition, before it was taken to the provost-marshal.

Appellant swears that he brought the gun home and had it stocked, and that appellee requested the loan of the gun, when appellant gave him an order on Fossett, who had it in his possession, and that appellee thus obtained possession of the gun, and refused to return it to him when demanded.

Appellee swears that he did not borrow the gun, but that appellant gave it to him, on his claiming to own it. He also introduced evidence tending to prove that he purchased the gun before it was taken to the office of the provost-marshal.

Appellant asked, but the court refused to give, these instructions:—

“The court instructs the jury, on behalf of the plaintiff, that if they believe from the evidence that the defendant [Wrenn] borrowed the gun in controversy from the plaintiff [Simpson], and afterwards refused to deliver up possession of the gun, upon demand being made by the plaintiff, then the right to the possession is in the plaintiff, and the jury will so find.

“The court further instructs the jury that if they believe from the evidence that the defendant [Wrenn] borrowed the gun in controversy from the plaintiff [Simpson], the defendant then became the bailee of the plaintiff, and cannot set up title to the gun in himself in this action; and if the jury

further find that the defendant refused to deliver up possession of the gun after demand being made by Simpson, then they will find for the plaintiff."

The whole contest in this case turns upon the refusal to give these instructions, and in giving the reverse of the propositions they contain. It is urged that a bailee cannot set up property in himself to defeat a recovery in replevin by his bailor. The proposition is undeniably true that a bailee of property may recover it of his bailor if he can show that he is lawfully entitled to the possession and use under a valid agreement, although the latter may be the owner. The action of replevin may be maintained by the owner against any person wrongfully in possession, as in such case the right of property carries with it the right of possession. But, on the contrary, a person having a special property in the chattel in controversy, entitling him to the possession, may recover it in this form of action against any one, even the owner. The statute has provided for both classes of cases.

In this case, it is contended that appellee obtained possession of the gun by borrowing it, with a promise for its return, and thereby admitted either that appellant was the owner, or was at least entitled, as against himself, to the possession; that if he borrowed the property, he is estopped from setting up title against his bailor while that relation exists between them; that he must first restore possession before he can raise the question of ownership in himself.

It is said by Story, in his work on bailments, section 286: "Even if the lender is not the owner of the thing, the borrower must ordinarily restore it to him, and has no right to set up the title of a mere stranger against him, for the lender has by his contract a right to be reinstated in his possession." He, however, lays down the rule that he will be discharged from liability to restore, if the property is taken from him by legal recovery by the owner.

If a borrower cannot set up title in another to exonerate himself from a return of the property to the lender, why should he be permitted to set up property in himself, to excuse him from a performance of his agreement to restore the property? It would seem that in both cases the reason is the same. A person claiming to own property should not be permitted to get possession by such a fraud, and then refuse to restore it because he claims to own it. This, in many cases, would give him an undue advantage, as it would impose the burden of

proving ownership on the lender, by a preponderance of evidence, while, had it remained in his possession, the burden would have been on the opposite party. We are therefore of the opinion that if appellee borrowed the gun, he should not be permitted to set up title in himself until he has restored it to appellant.

In *Bursley v. Hamilton*, 15 Pick. 40 [25 Am. Dec. 423], it was held that where the owner of property gave a receipt for it to an officer who had seized it under process, when sued for it by the officer he could not set up title in himself until he first restored the property to the officer.

In this case the evidence as to the loan was conflicting, and it should have been fairly left to the jury by proper instructions. The instructions given for appellee took that question from the jury, while those asked by appellant would have left it for their determination. These instructions asked by appellant, should, therefore, have been given.

The judgment of the court below must be reversed, and the cause remanded.

Judgment reversed.

BAILLEE'S RIGHT TO DENY BAILOR'S TITLE: See note to *Hostler's Adm'r v. Skull*, 1 Am. Dec. 589; *Stephens v. Vaughan*, 20 Id. 216; *Doty v. Hawkins*, 26 Id. 459; *King v. Richards*, 37 Id. 420.

KNOTTS v. PREBLE.

[50 ILLINOIS, 226.]

PROMISE TO SETTLE DOUBTFUL RIGHT, OR TO GET RID OF DOUBTFUL LIABILITY, IS BINDING, and made upon a good and valuable consideration, although the promisor was mistaken in regard to his liability.

NOTE IS WITHOUT CONSIDERATION, where it is made by one, whose building accidentally took fire, to another to whose building the fire extended, under the false representations of the latter that he could prove the former was the cause of the fire, thereby inducing him to believe that he was in some way liable.

ASSUMPSIT. The facts are stated in the opinion.

Tipton, Benjamin, and Rowell, for the appellants.

Williams and Burr, for the appellee.

By Court, BREESE, C. J. This was an action of *assumpsit*, in the McLean circuit court, by George W. Knotts and Mat-

thew A. Steers, late partners, against Charles H. Preble, on a promissory note, and verdict and judgment for the defendant.

The defense was, no consideration. The cause was tried by a jury, and much testimony heard.

It appears that Preble had an insurance on a stock of goods in a storeroom in Lexington, which was totally destroyed by fire, which extended to the store of the plaintiffs, who lost several thousand dollars by the accident.

The plaintiffs, by Knotts, persuaded the defendant that he was under some sort of obligation to bear a part of their loss, stating that the fire was occasioned by a defective flue in the defendant's building, and that he could prove it, and that he could prove things about the fire that defendant little thought of. After some conversation and negotiation, the defendant gave the note in suit, under the belief that plaintiffs had some kind of a claim on him, and under the influence of representations made to him by Knotts that he could prove the fire took place from defendant's stove-pipe, and that he had been notified to fix the pipe and flue, and that he had paid no attention to the notice.

Knotts, in his examination, stated that when he went to see Preble, he told him he had investigated the matter, and that he, Preble, was the cause of the fire.

It was under these circumstances the note was given, and as not the slightest evidence was given to connect Preble with the fire as occasioned by him, there was no legal or moral obligation upon him to make good any of the losses of Knotts and Steers. The note was evidently given on the supposition, awakened by the artfulness of Knotts, that Preble was liable. Knotts had not investigated the matter, and had no ground for the pretense.

It is no doubt true that a promise made to settle a doubtful right, or to get rid of a probable liability, is binding, and made upon a good and valuable consideration, and it is no defense for the promisor to say he was mistaken in regard to his liability. But this is not such a case. The note was obtained solely by force of these false representations made by Knotts that he could prove Preble was the cause of the fire. Knotts failed to prove any such thing. The facts in connection with the case were fairly left to the jury, and they have said there was no ground whatever on which to base the plaintiffs' claim. This destroys the idea of good faith on plaintiffs' part in making the claim.

As to the instructions, nine were asked for by the plaintiffs, the first three of which were given, and the others refused. The three instructions given by the court embraced the law of the case, and were all to which the plaintiffs were entitled under the evidence. Those refused are, for the most part, but mere repetitions of the principles contained in those given, and given or refused, could not affect the case one way or the other.

No objections are made here to the defendant's instruction.

On a careful review of the testimony and arguments submitted, we are satisfied there was no consideration for the note, and that the jury have done full justice, and as we perceive no error in the record, the judgment must be affirmed.

Judgment affirmed.

COMPROMISE OF DOUBTFUL CLAIM IS BINDING: *Farmers' etc. Ins. Co. v. Cheenut*, ante, p. 492, and note collecting prior cases in this series. The compromise of a doubtful right is a sufficient consideration for a promise: *Mulholland v. Bartlett*, 72 Ill. 62, referring to the principal case.

RILEY v. QUIGLEY.

[50 ILLINOIS, 304.]

CONSTRUCTIVE NOTICE OF UNRECORDED MORTGAGE, AFFORDED BY POSSESSION OF MORTGAGOR, ONLY GOES TO EXTENT of putting persons upon inquiry, and requiring a subsequent purchaser to apply for information to the person in possession.

PURCHASER OF LAND IN POSSESSION OF THIRD PERSON MAY DEAL WITH IT on the presumption that the title is in fact as disclosed by the record, if he honestly and properly applies for information to the one in possession, as to his rights, and is willfully refused; and the latter will be estopped from setting up an unrecorded instrument to the injury of him to whom he refused the information.

BILL to foreclose a mortgage. The facts are stated in the opinion.

J. C. and C. L. Conkling, for the appellant.

Herndon and Zane, for the appellee.

By Court, LAWRENCE, J. This was a bill to foreclose a mortgage, brought by Hugh Quigley against Robert Riley *et al.*, and the record discloses the following facts:—

In August, 1862, Michael Quigley executed to Hugh Quigley a mortgage for five thousand dollars. In July, 1863, Michael sold and conveyed the mortgaged premises to Robert

Riley for two thousand five hundred dollars, and received payment. At the time of this sale, Michael assured Riley there was no encumbrance on the lands, and referred him to the records. Riley employed an attorney to examine the title, and he found no mortgage upon the record, but advised Riley, as the latter had heard Hugh Quigley claim to have a mortgage, to inquire of him before purchasing, and for that purpose prepared the following notice:—

“To HUGH QUIGLEY.

“*Sir*,—I am making arrangements to purchase of Michael H. Quigley the following described real estate, situated in Sangamon County, Illinois, viz. [description of land follows, including the land mortgaged]. I understand you say you have a mortgage on said land, from said Michael H. Quigley, but I cannot find any mortgage on record. I am anxious to have the particulars of said mortgage, so as to determine whether it would be advisable for me to close my bargain with said Michael H. Quigley. He says he never executed a mortgage to you. I, therefore, request you to record your mortgage immediately, or send me a copy of it, or allow me to examine your mortgage within five days from this date. If you do not give me in some way, as specified above, a full statement of the particulars of your mortgage, and I shall purchase said land, I shall claim it without any regard to your mortgage, and hold the land unencumbered by your mortgage, provided you have any.

“ROBERT ^{his} x RILEY.
_{mark.}

“July 2, 1863.

“Witness: James C. Conkling.”

Riley, taking with him one Rayburn as a witness, proceeded to the residence of Hugh Quigley, who was then living on the mortgaged premises, though in what capacity does not appear, and served the foregoing notice upon him. At this point, the evidence is contradictory. Riley swears Quigley told him there was no mortgage, and he would cane him off the place. Quigley testifies he said, in the presence of both Riley and Rayburn, that he had a mortgage, and then told Riley to leave the place. The character of Quigley for veracity is impeached by several witnesses.

James Rayburn testified that he served the notice on Hugh Quigley, who became very boisterous, and told Riley to get off the premises or he would cane him. When Quigley and Riley

commenced talking in that way, witness thought they were going to have a fuss, and started and walked away; what they may have said after he stepped away, he did not know. Does not recollect that Quigley said he had no mortgage on the farm. He ordered Riley off the premises. The language which Hugh Quigley used was after he read the notice, and is all the language witness recollects. Quigley did not use any language before the notice was read.

The testimony of Quigley, that he stated in the presence both of Riley and Rayburn that he had a mortgage, is thus contradicted both by Riley and Rayburn, and the latter is a disinterested witness. It is true, as urged by counsel for appellee, that self-interest would have prompted Quigley to state that he had a mortgage, but it is equally true that self-interest would have dictated a full and explicit statement of the particulars of the mortgage, as requested by the notice, and even by his own testimony this he did not give. But whatever his own interest would have dictated, the case must be decided upon the evidence; and from this it is clear he treated the application of Riley as an insult, and drove him from the premises. It is probable there was ill feeling between them, as the record discloses that Quigley was soon afterwards arrested for an assault upon Riley; and if their relations were unfriendly, it is not so improbable, as counsel seem to suppose, that Quigley refused the desired information, since it is very certain that he drove Riley from the premises by threats of violence. The entire testimony compels us to the conclusion that for some reason he was angry at being served with the notice; and instead of giving the information which Riley had a right to ask, treated him with contumely, and refused to satisfy him with regard to the mortgage.

What, then, were the rights of these parties? Riley was desirous of purchasing the land, and had employed an attorney in order to secure an unencumbered title. The record showed such a title in Michael Quigley, and the latter assured him the record spoke the truth. But either from rumor, or from the possession of Hugh Quigley, he had such information as to put him on inquiry, and make it his duty to apply to the latter in order to give him an opportunity to make known the exact nature of his claim. This he did, and thus discharged all the duties imposed upon him by the law. On the other hand, Hugh Quigley disregarded the requirements of the law at every step. He ought to have recorded his mort-

gage. This delinquency, however, the law excused if he was in possession under it, or if a person dealing with the land had information in regard to the encumbrance. The proof as to the character of the possession is not clear; but admitting all that can be claimed in that regard, and admitting, what is undoubtedly true, that Riley had heard something of a mortgage, although assured by his vendor there was none, yet the law accepts this constructive notice in lieu of a record only to the extent of putting persons upon inquiry, and requiring a subsequent purchaser to apply for information to the person in possession, or to him who is said to hold the mortgage. The law says this is required by good faith; but it also must surely say that if such information is honestly and properly asked on the one side, and willfully refused on the other, he who has done all in his power to acquire it may deal with the land on the presumption that the title is in fact as disclosed by the record. It can never permit a person both to keep his mortgage from the record, and to refuse information in regard to it to one who has a right to apply, and does so in a proper manner. The mortgagee who does this must be held estopped from setting up his mortgage to the injury of him to whom he has refused the information. He has no right to withhold the information, and if he wantonly does so from one who is about purchasing the property, the plainest dictates of equity and good faith require that, as against such purchaser, his mortgage shall lose its force: *Wendell v. Van Rensselaer*, 1 Johns. Ch. 354; *Storrs v. Barker*, 6 Id. 167 [10 Am. Dec. 316].

In the opinion of a majority of the court, the decree must be reversed and the cause remanded.

Decree reversed.

POSSESSION OF LAND AS NOTICE OF RIGHTS OF ONE IN POSSESSION: See *Hunter v. Watson*, 73 Am. Dec. 543, and note; *Morrison v. Kelly*, 74 Id. 169, and note; *Bloomer v. Henderson*, 77 Id. 453; *Blankenship v. Douglas*, 82 Id. 608; *Dutton v. Warschauer*, 82 Id. 765. Open and visible possession of land is notice to the world that the occupant has some interest in it, and whoever buys it while that possession continues, takes it subject to that interest: *Flint v. Lewis*, 61 Ill. 306, citing the principal case; but a person put upon inquiry is not bound to do more than apply to the party in interest for information: *Converse v. Blumrich*, 90 Am. Dec. 230.

PORTER v. CURRY.

[50 ILLINOIS, 319.]

PARTNER RATIFIES ACT OF COPARTNER, not within the scope and usage of the partnership, in purchasing property on the firm credit, by obtaining possession and selling it as firm property.

ASSUMPSIT by Porter against Curry and Majors, as partners, for the balance of the price of a mare, claimed to have been sold by the plaintiff to the defendants. Curry alone was served. The defendant had a verdict and judgment, and the plaintiff appealed.

Skinner and Marsh, for the appellant.

Warren and Wheat, for the appellee.

By COURT, LAWRENCE, J. Curry and Majors were partners in the manufacture of wagons, and in August, 1867, sold a wagon to Porter, the appellant, for \$110, for which he gave his note. Soon afterwards, Porter, by an arrangement with Majors, sold the latter a mare for \$200, and received therefor his own note, and one executed by Majors for \$90. Porter swears, however, that Majors claimed to be purchasing the horse for the use of the firm, and on the credit of the firm, and that he himself supposed he was taking the firm note, instead of the individual note of Majors, and not being able to read, did not discover his error until Majors absconded and he showed his note to a neighbor. Majors absconded to Missouri a few days after the purchase, taking with him the mare. Curry pursued Majors, obtained possession of the mare, and sold her. Porter brought this suit against the firm to recover the ninety dollars, and it is resisted on the ground that the mare was not required in the business, and therefore Majors had no power to buy her on the firm credit.

It is clear, however, even if the purchase of a horse was not within the scope and usage of such a partnership as existed between Curry and Majors, yet if the mare was in fact purchased on the firm credit, and if Curry afterwards claimed her from Majors as firm property, and obtained possession of her on that ground, he thereby ratified the act of Majors in buying her on the partnership credit. He cannot be permitted at the same moment to claim the benefit of the purchase and deny its obligations. This view of the law was embodied in the sixth and seventh instructions asked by plaintiff, and they should have been given. For the same reason, the first

instruction given for the defendant should have been refused. It puts the case to the jury wholly on the question of an original power by Majors to buy on the firm credit, and makes the case turn entirely upon that, leaving the question of ratification altogether out of view.

The judgment is reversed and the cause remanded.

Judgment reversed.

PARTNER MAY BIND COPARTNER BY CONTRACTS AND ACTS WITHIN SCOPE OF PARTNERSHIP BUSINESS, but not otherwise, unless assented to: *Crosthwaite v. Ross*, 37 Am. Dec. 613; *Bentley v. White*, 38 Id. 186; *Stockton v. Frey*, 45 Id. 138; *Flemming v. Prescott*, 45 Id. 766; *Lanier v. McCabe*, 48 Id. 173; *Cronier v. Kirker*, 51 Id. 724; *Warder v. Newdigate*, 52 Id. 567; *Kinsler v. McCants*, 53 Id. 711; *Buryan v. Lyell*, 55 Id. 53; *Mussey v. Holt*, 55 Id. 234; *McKinney v. Brights*, 55 Id. 512; *Western Stage Co. v. Walker*, 65 Id. 789; *Hehn v. McCaughan*, 66 Id. 598; *Haldeman v. Bank of Middletown*, 70 Id. 142; *Lockwood v. Beckwith*, 72 Id. 69; *Wright v. Boynton*, 72 Id. 319; *Louden Savings Fund Society v. Hagerstown Savings Bk.*, 78 Id. 390; *Stockwell v. Dillingham*, 79 Id. 621; *Grinwold v. Haven*, 82 Id. 380; *Skillman v. Lockman*, 83 Id. 96; *Heenan v. Nash*, 83 Id. 790; *North Pennsylvania Coal Co.'s Appeal*, 84 Id. 487; *Morehouse v. Northrop*, 89 Id. 211; *Barker v. Mann*, 96 Id. 373.

COLLINS v. HAYTE.

[50 ILLINOIS, 287.]

DEFENDANTS IN ACTIONS FOR MALICIOUS PROSECUTION SHOULD BE ALLOWED GREAT LATITUDE OF INQUIRY, for the purpose of showing probable cause.

IT IS COMPETENT TO SHOW ON CROSS-EXAMINATION OF WITNESS FOR PLAINTIFF, IN ACTION FOR MALICIOUS PROSECUTION, that he became a member of the molders' union after he left the defendants' employment, as establishing the influences under which the witness was placed by joining the union, although the evidence did not technically pertain to the matter of the direct examination, where the prosecution complained of as malicious was instituted by the proprietors of a foundry, who employed men contrary to the rules of the union, against certain persons connected with the union, who had conspired to entice away the defendants' employees.

IT IS COMPETENT FOR DEFENDANT, IN ACTION FOR MALICIOUS PROSECUTION, TO SHOW what was the object of a meeting of their employees, which was attended by the plaintiff, whether the meeting was held at the place of meeting of the molders' union, and whether the defendants' employees had made any complaints before the strike, and what connection the plaintiff had with such complaints, as establishing a conspiracy, and officious intermeddling and unwarranted conduct by the members of the union, where the prosecution complained of as malicious was instituted by the proprietors of a foundry, who employed men contrary to the rules of the union, against certain persons connected with the union, who had conspired to entice away the defendants' employees.

IT IS COMPETENT FOR DEFENDANTS, IN ACTION FOR MALICIOUS PROSECUTION, TO SHOW WHAT OPINION WAS GIVEN THEM BY THEIR ATTORNEY as to their right of action and arrest of the plaintiff, without being confined to the inquiry whether the attorney advised the action to be brought.

BRINGING ACTION AFTER TAKING COMPETENT LEGAL ADVICE that a right of action exists, will, in most cases, relieve it from the charge of having been brought maliciously and without probable cause.

CASE for malicious prosecution, brought by William B. Hayte against Frederick Collins and others. The facts are sufficiently stated in the opinion.

N. Bushnell, Skinner and Marsh, and Wheat and Maroy, for the appellants.

Jackson Grimshaw, and Warren and Wheat, for the appellee.

By Court, BREESE, C. J. We have confined our attention chiefly to the three errors first assigned by appellants, which are as follows: Excluding legal and proper evidence offered by appellants, and in sustaining objections to legal and proper questions put by appellants; refusing to permit appellants to propound to witnesses at the trial legal and proper questions, and in refusing to permit proper questions put to witnesses by appellants to be answered; permitting appellee to put illegal and improper questions to the witnesses, and to give illegal evidence to the jury.

We have looked carefully into the testimony found in the bill of exceptions, and are satisfied that much of the evidence offered by appellants and excluded should have been received.

The action was case, for a malicious arrest, the plaintiff having been arrested by defendants in an action brought by them against him and others for enticing away their apprentices, which action was dismissed by them, no trial having been had.

The facts briefly are, that appellants were extensively engaged in the iron foundry business, at Quincy, employing a very large capital, and doing a heavy and profitable business under the free system, as distinguished from the antagonist system of the molders' union. They had at one time, in 1864, carried on their establishment under the rules and control of this union, but changed it to a free foundry, and adopted a system of apprenticeship and journeyman work prohibited under the system of the molders' union. On this change by appellants, the union molders employed by them quit work,

and in June, 1866, all the apprentices of appellants quit their employment.

Appellee being considered, with others, an active instigator of the strike by their apprentices, and who belonged to the molders' union, was prosecuted for his alleged unlawful conduct in enticing away their apprentices, and bail required in a large sum of money, which resulted in his short imprisonment.

It is in vain to say, when the evidence is considered, that appellee was not actively hostile to appellants' establishment. Many witnesses establish this fact.

That the molders' union were directly implicated in the attempt to break up appellants' free establishment is abundantly proved, and that appellee was an active participant therein appears to be well established by the testimony.

This design existing with the molders' union, it became very important to show that the witnesses for the plaintiff became members of that union after they left appellants; but when the question was asked, on cross-examination, where great latitude is allowed, of a witness if he had joined the molder's union, the court would not permit the question to be put. In this the court erred; for although it did not technically pertain to the matter of the direct examination of the witness, still it was admissible to show the influences under which the witness was placed by joining the molders' union.

All the questions put to Smeiderkamp, on cross-examination, and rejected by the court, should, on the above principle, have been allowed, and so with Malring and Carter. The refusal of the court to permit them to answer the questions put on cross-examination was erroneous.

The question put to defendants' witness, Pfeiffer, by the defendants, as to what he learned was the object of the meeting at the engine-house, was so applicable to the whole matter in controversy, the witness having stated appellee was at that meeting, that it is difficult to perceive on what ground it was excluded; and so of the question which immediately followed it, and excluded,—“Was or was not this meeting held at the place of meeting of the molders' union?” The objection was not that the question was leading, but that it was an improper question in itself. We think, as a conspiracy was sought to be proved by appellants by members of this union against them, these questions were very proper, as tending in that

direction. So the question put to Lopaz, of the same nature, should have been answered by him, for the reasons given.

This question put to Emery, a witness for defendants, "State whether there was any complaint among the apprentices before the strike," in the view we take of the case, was pertinent, whether appellee was connected with the "complaints" or not. An effort was made by defendants to connect him with the strike, and defendants should have been allowed to show there was really no complaint by the apprentices. The inference would then be a fair one that they struck by reason of the officious intermeddling and unwarranted conduct of plaintiff and others. All the questions propounded to this witness which were disallowed by the court should have been allowed, and the same may be said of those put to McElfrish, who was a member of the molders' union, and stood in the position of an unwilling witness, with whom great latitude of examination is allowed.

When the nature of the action is considered, the *onus* of proof of probable cause being on the appellants, justice requires they should not be closely circumscribed in their efforts to that end. It is the duty of every citizen, knowing a criminal offense has been committed, to give notice thereof to the authorities, and if a prosecution is instituted, and fails, he ought to be allowed to go into an examination of all the facts and circumstances attending the case, in order to his own justification. Were not this so, but few persons would be found willing to incur the risk of a prosecution against a suspected malefactor, an action for a malicious prosecution to ensue upon his acquittal.

But we do not intend to go into any examination of the proof in this case, as going to show probable cause, but only to state a safe principle, that in such actions great latitude of inquiry is, and should be, indulged.

Another error was, refusing to permit Mr. Bushnell, one of appellants' counsel, who had stated that they had consulted him and stated the facts of the case, to answer what opinion he gave them as to their right of action and arrest of appellee. The court would only allow him to be asked if he advised bringing the suit by appellants.

Now, it is very apparent this latter question was an impertinent one, so far as Mr. Bushnell or any other high-minded lawyer might be concerned, for such lawyers do not advise clients to bring suits. They give them the law on the facts

stated. We question very much if Mr. Bushnell ever advised a client to bring an action. The appellants had a right to have the specific question asked of Mr. Bushnell answered by him,—did he advise appellants that they had a right of of action, not, did he advise the action brought.

Bringing an action after taking competent legal advice that a right of action exists, will, in most cases, relieve it from the charge of having been brought maliciously and without probable cause. Appellants were entitled to have the precise question put and answered by Mr. Bushnell.

For these errors, the judgment of the circuit court is reversed, and the cause remanded.

Judgment reversed.

ADVICE OF COUNSEL AS NEGATING MALICE, AND SHOWING PROBABLE CAUSE: See *Yocum v. Polly*, 36 Am. Dec. 583, and note; *Griffin v. Chubb*, 58 Id. 85; *Bartlett v. Brown*, 75 Id. 675; *Ross v. Innis*, 85 Id. 373. The principal case was cited in *Anderson v. Friend*, 71 Ill. 479, to the point that it is a question of fact whether a party has fairly communicated to his counsel the facts within his knowledge, and used reasonable diligence to ascertain the truth, as also whether he acted in good faith upon the advice received from counsel, to be determined by the jury from the evidence.

THE PRINCIPAL CASE WAS FOLLOWED in *Comstock v. Wood*, 50 Ill. 352; *Collins v. Fisher*, 50 Id. 359, which arose out of the same difficulty. The principal case again came before the court in *Collins v. Hayte*, 50 Id. 353.

MUMFORD v. CANTY.

[50 ILLINOIS, 370.]

VALIDITY OF CONTRACT IS TO BE GOVERNED BY LAW OF PLACE WHERE IT IS MADE, as a general rule; although the laws of the state where the contract is made will not be permitted to contravene the positive laws, institutions, and policy of the state where the contract is sought to be enforced.

CHATTEL MORTGAGE WHICH, BY LAWS OF STATE WHERE IT IS MADE, IS NOT PER SE FRAUDULENT as to *bona fide* creditors of the mortgagor, because the property is permitted to remain in the possession of the mortgagor after the maturity of the debt, will be so construed, notwithstanding that by the laws of another state, into which the property is subsequently brought by the mortgagor, and where it is attached by a *bona fide* resident creditor of the mortgagor, it would be fraudulent *per se*.

REPLEVIN. The facts are stated in the opinion.

William H. Underwood and L. H. Hite, for the appellant.

George W. Davis and G. Kærner, for the appellee.

By Court, WALKER, J. This was an action of replevin brought by appellant, in the city court of East St. Louis, on the twenty-fourth day of March, 1868, against appellee, to recover two mules, a two-horse wagon, and a set of double harness. After a trial in that court, the cause was removed to the circuit court of St. Clair County, by appeal, and tried at the October term, 1868, and resulted in a judgment in favor of appellee, from which this appeal is prosecuted.

The bill of exceptions shows that it was tried upon the following agreed state of facts and evidence:—

“That John A. Knight was, on the first day of May, 1867, and continued to be until this suit, a resident and citizen of St. Louis, Missouri; that he duly executed the deed offered in evidence to secure a *bona fide* debt, which was unpaid at the commencement of this suit; that said Knight became indebted to George Pointen, a resident of St. Clair County, Illinois, for coal, and Pointen sued out of the city court of East St. Louis (a court having full jurisdiction of the case) an attachment against the goods of said Knight, directed to said Canty, who levied on the same, and took from the possession of Knight said property, the same being at the time in East St. Louis.

“That said Knight kept said property in St. Louis, Missouri, and at the time of the attachment it was used temporarily to haul coal from the city of East St. Louis, Illinois, and that Pointen gave Knight credit on account of his supposed ownership of this property.

“It is also stipulated that Canty was, at the time of the seizure, and ever since, marshal of the city of East St. Louis, and the property attached is part of the property mortgaged; that Knight, the mortgagor, was in possession of the mortgaged property until said attachment, and that said mortgage was made, acknowledged, and recorded according to the laws of the state of Missouri; and that both parties may refer to the statutes of Missouri on the hearing of this case, as was done in the court below, where all the above facts were admitted.”

The deed referred to is a deed of trust, made by Knight to Mumford, the plaintiff, for the benefit of Huse, Loomis, & Co., all residents of the city and county of St. Louis, and state of Missouri. It is dated May 1, 1867, is given to secure said firm in a note of that date for the payment of \$2,908.88, and six months after date, with interest at ten per cent per annum, made by said Knight to said firm. Among other property

described in the deed is one span of mules and one two-horse wagon, etc. The property is conveyed in trust to Mumford, to be released upon payment of notes when due; and upon failure to do so, said trustee to sell said property in St. Louis, at public sale, for cash, etc., after notice, etc., proceeds to be applied to payment of costs and expenses of the trust, and payment of said note, and balance to Knight, or to his heirs or assigns. The deed was acknowledged on the thirteenth day of May, 1867, before a notary public, and filed for record in the proper office in St. Louis County on the day following.

The chattel mortgage law of Missouri is the same as the first section of our statute. Section 8, Revised Laws, 1845, page 527, is this:—

“No mortgage or deed of trust of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged property shall be delivered to and retained by the mortgagee or trustee, or *cestui que trust*, or unless the mortgage or deed of trust be acknowledged or proven, and recorded in the county in which the mortgagor or grantor resides, in such manner as conveyances of land are by law directed to be acknowledged or proven and recorded.”

There is, however, this difference in the two statutes, that while there is but slight difference in the phraseology between the first section of our statute and the eighth section of the Missouri law, the third section of our act declares that possession of the mortgaged property may remain with the mortgagor, if it is so provided in the conveyance. Under the Missouri statute, the courts of that state have held, where possession remains with the mortgagor, that it is not fraudulent *per se*, as against creditors, but that it might be shown to be *bona fide*: *Shepherd v. Trigg*, 7 Mo. 151. And in the case of *Bevans v. Bolton*, 31 Id. 437, it was held that the removal of the mortgagor with the property to another county in the state from that in which the mortgage was executed does not subject such property to levy and sale on execution against the mortgagor, or affect the title of the mortgagee. That court holds that after the maturity of the debt, the mortgagee has the legal title, and may sue for and recover it as his own: *Robinson v. Campbell*, 8 Id. 365. This court holds the same rule. But that court holds that possession by the mortgagor for a length of time after the maturity of the debt may be shown to have been

fair, as against creditors and purchasers, and the mortgagor may hold the property: *Shepherd v. Trigg*, *supra*.

The seventh section of our chattel mortgage law extends the operation of that statute to deeds of trust, and such other conveyances of personal property as have the effect of a mortgage, or as create a lien. This court, as early as in the second volume of our reports, in the case of *Davenport v. Thornton*, 1 Scam. 296, following the common-law rule, as announced in *Twyne's Case*, 3 Coke, 80 b, held that in all conveyances of personal property, permitting it to remain with the vendor is fraudulent *per se*, and void as to creditors and purchasers, unless such possession be consistent with the deed. And since the adoption of our statute, the same rule has been fully recognized and applied in numerous other cases, in which it has been held to be equally fraudulent, as to creditors and purchasers, to permit the property to remain with the mortgagor after the maturity of the debt, although there may have been a provision in the mortgage permitting him to retain it until the debt matured: *Frink v. Statts*, 24 Ill. 632; *Reed v. Evans*, 19 Id. 594; *Cass v. Perkins*, 23 Id. 382; and other cases might be cited.

It will be seen from these cases that the construction given to our statute is different from that given to the Missouri act; and it may have been for the plain reason that where our statute provided that the parties might declare in the mortgage that the property should remain with the mortgagor, the legislature intended to leave the common-law rule, as announced in *Twyne's Case*, *supra*, in full force, except where the parties expressly agreed, in the conveyance itself, when duly recorded, that the possession should not accompany the lien. No other construction could reasonably have been given to our act than that which our court has adopted. The question, then, arises, as to which rule shall be adopted when property has been mortgaged in Missouri, and their statute has been fully complied with, by acknowledgment and recording of the deed, and such chattels remain in the possession of the mortgagor after the maturity of the debt, and the property is afterwards brought into this state, and a *bona fide* creditor seizes it under execution or attachment, and it is claimed by the mortgagee.

As a general rule, the validity of a contract is to be governed by the law of the place where it is made; and the law of the place where the contract was made is admitted to en-

able the courts to enforce the contract as it was intended by the parties entering into it. But such foreign laws will not be permitted to contravene the positive laws, institutions, or policy which prohibit such a contract: *Story's Conflict of Laws*, sec. 327.

But it is not opposed to the policy of this state to enforce contracts made in Missouri, according to the laws of that state, when they are not based upon an immoral or criminal consideration. It has been held by this court that a contract entered into in another state, and in conformity to their laws, may be enforced, and the rate of interest collected under the contract according to the laws of that state, although it may be larger than the rate allowed by our laws: *McAllister v. Smith*, 17 Ill. 328 [65 Am. Dec. 651]. In this question of interest each state adopts that rate which it regards for the best interest of its citizens; and this is purely a question of policy, and that policy will not prevent the enforcement of a contract lawfully made in another state, although it contravenes our policy, or notwithstanding it might be injurious to our citizens. This rule is, however, never adopted, when it would contravene our criminal laws, or would sanction vice and immorality, or is against a positive prohibition of law. It is such policy that prohibits the enforcement of laws of other states in our courts. This court has held, in several cases, that contracts made in other states will be enforced, although not conforming to our laws, if they are in accordance with the laws of the state where they were executed: *Smith v. Whitaker*, 23 Id. 367; *Phinney v. Baldwin*, 16 Id. 108.

In the case of *Blystone v. Burgett*, 10 Ind. 28 [68 Am. Dec. 658], it was held that a chattel mortgage made in Illinois, in good faith, and not recorded, was not valid as against a purchaser from the mortgagor, who, after executing the mortgage, removed to Indiana, although, the court say, had it been recorded they would have found no difficulty in sustaining it; and as to personal property, they were inclined to give a mortgage the same effect as it had in the state in which it was executed; and in the case of *Kanaga v. Taylor*, 7 Ohio St. 134 [70 Am. Dec. 62], the same rule is announced. In the case of *Smith v. Hutchings*, 30 Mo. 383, it was held that a mortgage made in and valid by the laws of Kentucky, although invalid if made in Missouri, would be enforced in the courts of the latter state. The cases of *Booker v. Stacy*,

25 Miss. 471, *Holt v. Renwick*, 11 N. H. 285, and *Langworthy v. Littell*, 12 Cush. 111, are to the same effect.

These authorities seem to be in point, and announce rules which, if recognized, must govern this case. We have been referred to no adjudged case that announces a different rule.

If this were not so, a person purchasing property in Missouri from a mortgagee where the debt was past due, and having a valid title by coming to this state with the property, would be liable to lose it in an action of replevin by a purchaser from the mortgagor. In that state the sale by the mortgagor would be void, but valid and binding in this state, while such a sale by the mortgagee would be valid in that, but void in this state. We are, for these reasons, of the opinion that the case must be governed by the law of comity.

The judgment of the court below must be reversed, and the cause remanded.

Judgment reversed.

CONTRACT IS TO BE GOVERNED BY LAW OF PLACE WHERE MADE: *Young v. Harris*, 61 Am. Dec. 170, and note; *Phinney v. Baldwin*, 61 Id. 62; *Smith v. Godfrey*, 61 Id. 617; *Emerson v. Patridge*, 62 Id. 617; *Peck v. Hubbard*, 62 Id. 605; *Sears v. Shropshire*, 66 Id. 206; *Lockwood v. Mitchell*, 70 Id. 78; *Hunt v. Standart*, 77 Id. 79; *Ayer v. Tilden*, 77 Id. 355; *Hefferlin v. Sinsinderfer*, 85 Id. 599; *Lewis v. Headley*, 87 Id. 227; *Galliano v. Pierre*, 89 Id. 643; *Franklin v. Twogood*, 96 Id. 73; unless it is to be performed elsewhere: *Young v. Harris*, *supra*; *McAlister v. Smith*, 65 Id. 651; *Kanago v. Taylor*, 70 Id. 62; *Mason v. Dousay*, 85 Id. 368; *City of Aurora v. West*, 85 Id. 413; *Lewis v. Headley*, 87 Id. 227; *Stricker v. Tinkham*, 89 Id. 280; *Kennedy v. Knight*, 94 Id. 543; *Davis v. Morton*, 96 Id. 345; *Ivey v. Lalland*, 97 Id. 475.

CHATTEL MORTGAGE VALID WHERE MADE VALID EVERYWHERE: *Kanago v. Taylor*, 70 Am. Dec. 62, and note in which the question is considered.

CITY OF OLNEY v. HARVEY.

[50 ILLINOIS, 458.]

INDEBTEDNESS INCURRED BY INCORPORATED TOWN IS NOT EXTINGUISHED by the change of the town into a city by an act of the legislature.

JUDGMENT WHICH IS NULLITY BECAUSE RENDERED AGAINST CITY COUNCIL INSTEAD OF CITY, MAY BE VACATED by the court at a subsequent term. COURT HAS SAME JURISDICTION OVER CITY AS IT WOULD HAVE HAD OVER TOWN, where, pending an action against the town, the town is changed into a city by an act of the legislature.

MUNICIPAL CORPORATION MAY BE COMPELLED BY MANDAMUS TO PAY JUDGMENT RENDERED AGAINST IT, there being no other adequate remedy, as an execution cannot be levied upon its property.

MANDAMUS. The facts are stated in the opinion.

J. G. Bowman, for the appellant.

Silas L. Bryan, for the appellees.

By Court, LAWRENCE, J. In 1866, Harvey and Boyd, the appellees herein, brought suit against the then town (now city) of Olney, to recover a sum of money which the town had illegally required them to pay. The case came to this court, and we held the town liable, and remanded the case for another trial, the judgment in the circuit court having been in favor of the town. The case is reported in 42 Ill. 336. Before the order remanding the case was entered in this court, the town of Olney had been converted, by an act of the legislature, into a city. At the June term, 1867, of the circuit court of Richland County, the case was redocketed against the president and trustees of the town of Olney, and at a subsequent day of the term the city council of the city of Olney were substituted as defendants, notice upon the late president and trustees of the town and upon the new mayor and city council having been served and proved. The city council did not appear, and judgment was rendered against them.

At the next November term, it having been discovered that the city of Olney, instead of the city council, should have been made defendant, and a new notice having been served upon the mayor and council, the case was again docketed, the judgment of the June term set aside, the case submitted to a jury, and upon their verdict a judgment was rendered for the present appellees. The city did not appear either at the June or November term.

The city refused to pay the judgment thus rendered, and this *mandamus* was sued out to compel it to do so. The circuit court awarded a peremptory *mandamus*, and the city appealed.

It is insisted by counsel for appellant that upon the dissolution or civil death of a corporation all debts due to or from it are extinguished. This is, of course, the rule. The individual corporators would not be liable, unless made so by the terms of their charter. But in this case the corporation has not been destroyed. The city of Olney is the same municipality as the town of Olney. It has merely changed its machinery of government and the titles of its officers, and is called a city instead of a town. But it is the same munici-

pality. It consists of the same people, and whatever corporate property the town possessed would without dispute devolve upon the city. The first section of the charter (volume 1, Private Laws of 1867, page 824) provides that "the inhabitants of the town of Olney" shall constitute a corporation under the name of the "city of Olney," and the last section provides for the continuance in office of the town officers until the city officers shall be elected and qualified, thus showing that the legislature considered itself to be merely changing the municipal form of government, and adding to its powers and privileges. But the municipal corporation that incurred the debt now sought to be recovered still remains a municipal corporation; and to hold that it can set its creditors at defiance by procuring the legislature to call it a city instead of a town, and its officers mayor and aldermen instead of president and trustees, would be such a burlesque upon justice that the proposition needs but to be stated to be rejected.

It is said, however, that the court had no power at the November term to set aside the judgment of the June term against the city council. That judgment was a nullity, as the city council was not a corporation, and the court did not, by this void judgment against the city council, lose its jurisdiction. In this collateral proceeding, we do not look at irregularities. The only question is, Did the court, at its November term, have jurisdiction over the city? Holding, as we do, that the town and the city were substantially the same corporation when the case was remanded, and notice given to the official authorities of the city, the court had the same jurisdiction over it that it would have had over the town if the style of the corporation had remained unchanged.

It is in proof that payment was demanded of the city, and refused; and as under the former decisions of this court an execution cannot be levied on the city property, the relator has no adequate remedy but by *mandamus*, and the peremptory writ was properly awarded.

The judgment of the court below must be affirmed.

Judgment affirmed.

VACATING VOID JUDGMENTS AFTER LAPSE OF CONSIDERABLE TIME. — As a general rule, every judgment regularly entered becomes final at the end of the term: *Freeman on Judgments*, sec. 96; *Morgan v. Hays*, 12 Am. Dec. 147, and note; *Rawdon v. Ripley*, 58 Id. 370; but a judgment which is a nullity may be vacated by the court which rendered it at any time: *Freeman on Judgments*, sec. 98; *Shuford v. Cain*, 1 Abb. 302; *United*

States v. McKnight, 1 Cranch C. C. 84; *Wood v. Luss*, 4 McLean, 254; *Harrie v. Hardeman*, 14 How. 334; *Pettus v. McClanahan*, 52 Ala. 55; *Crane v. Barry*, 47 Ga. 476; *Forman v. Carter*, 9 Kan. 674; *Cotten v. McGehee*, 54 Miss. 621; *Stacker v. Cooper Circuit Court*, 25 Mo. 401; *Dederick's Adm'r v. Richley*, 19 Wend. 108; *Manufacturer's etc. Bank v. Boyd*, 3 Denio, 257; *Hallett v. Righters*, 13 How. Pr. 43; *Bender v. Askew*, 3 Dev. 149; S. C., 22 Am. Dec. 714, 715; *Winslow v. Anderson*, 3 Dev. & B. 9; S. C., 32 Am. Dec. 651; *Keaton v. Banks*, 10 Ired. 381; S. C., 51 Am. Dec. 393; *Harvey v. Edmunds*, 68 N. C. 243; *Cowles v. Hayes*, 69 Id. 406; *Hunt v. Yeatman*, 3 Ohio, 15; *Reynolds v. Stansbury*, 20 Id. 344; *In re College Street*, 11 R. I. 472; *Ingram v. Belk*, 2 Strob. 207; S. C., 47 Am. Dec. 591, 595; *Mills v. Dickson*, 6 Rich. 487; *Franks v. Leckey*, 45 Vt. 395; *Hoe v. Barber*, 4 Hen. & M. 439; *Peterson v. Peterson*, 13 Phila. 82, 86; *People v. Greene*, 16 Pac. Rep. 197.

MANDAMUS WILL LIE TO COMPEL MUNICIPAL CORPORATION TO PAY JUDGMENT: *Coy v. City Council of Lyons*, 85 Am. Dec. 539, and note; note to *Dane v. Derby*, 89 Id. 738; and this is the proper remedy: *Town of Lyons v. Cooledge*, 89 Ill. 595; it is error to award an execution against the corporation: *City of Bloomington v. Brokaw*, 77 Id. 197; both citing the principal case.

THE PRINCIPAL CASE IS CITED in *Chamberlain v. City of Evansville*, 77 Ind. 545, to the point that the change of a city charter does not thereby change the existing ordinances that are in harmony with the charter as changed; and in *City of Cairo v. Campbell*, 116 Ill. 309, to the point that where a court has jurisdiction of the parties and of the subject-matter, in a suit against a municipal corporation, its judgment against the corporation, until reversed or set aside, is absolutely conclusive in a proceeding by *mandamus* to compel the corporate authorities to levy and collect a tax to discharge the same, as to the right of the plaintiff therein to receive and the duty of the defendant to pay the amount of it.

DEAN v. BAILEY.

[50 ILLINOIS, 481.]

MARRIED WOMAN DOES NOT RENDER HER PERSONAL PROPERTY LIABLE FOR HER HUSBAND'S DEBTS, merely by allowing him to have a general use and control over it, consistent with their common interests; although if she permits her husband to deal with and sell it as his own, a purchaser from him would be protected.

ACTION on a replevin bond. The facts are stated in the opinion.

George W. Wall, for the appellant.

Henry and Fouke, for the appellee.

By Court, LAWRENCE, J. This was an action on a replevin bond, brought by Bailey, as sheriff, against Sophia E. Dean and others, under the following circumstances:—

Executions against W. W. Dean, the husband of the said

Sophia, had been levied on a mule, a quantity of potatoes, and a horse-power. His wife replevied this property from the sheriff, but the suit was dismissed, without a trial, upon the merits. The sheriff then brought this suit upon the bond, and the defendants pleaded that the property replevied was the property of Sophia E. Dean. On this plea, issue was joined, and a trial had, which resulted in a verdict and judgment for the plaintiff, from which Sophia E. Dean appealed. There was evidence that her husband was wholly insolvent, and that the farm upon which they lived had been bought with the money of the wife, derived in part from the estate of her father, and in part from other relations. There was similar evidence in regard to the purchase of the horse-power and mule. The potatoes had been raised upon the farm, as she testifies, by labor paid with her money.

The court gave to the jury, for the appellee, the following instructions:—

“3. If the jury believe, from the evidence, that Sophia E. Dean allowed W. W. Dean to buy and sell the personal property on said farm as his own, and in his own name, without giving notice to the world that he, W. W. Dean, was only an agent, and that the property in controversy was a part of said property so bought, then they will find the value of said property for plaintiff.

“4. If the jury believe from the testimony that the horse-power and mule in question were used and controlled by W. W. Dean, as his own property, with the knowledge and consent of Sophia E. Dean, and that at the time of such use and control said Dean was the head of the family of Sophia E. Dean, then they will find for the plaintiff the value of the property proven.

“5. The jury are further instructed that they must believe the property in question was acquired by Sophia E. Dean from some person other than her husband, and by and independent of him, and that such was not used, exercised, or controlled by Dean as his own property, with her knowledge and consent, before they can find for the defendant.”

It is plain that the rule laid down in these instructions would, in many cases, substantially destroy the protection which the statute in regard to the property of married women was designed to give. Undoubtedly, if a married woman, owning personal property, permits her husband to deal with and sell it as his own, a purchaser from him would be protected in

his title against a claim by her, but it would be on the ground that she had held him forth to the world as her agent, with power to sell. But if we were to hold that a wife, owning personal property, rendered it liable for her husband's debts, merely by allowing him to have a general use and control over it, as laid down in these instructions, the property of the wife could be secure only, as suggested by counsel, by a practical divorce, *a mensa et thoro*, and by setting up a domestic establishment entirely apart from her husband. Take for example such a case as the present, and there must be many like it, where the husband and wife live upon a farm, which, with the stock upon it, has been bought with the money of the wife. It must follow, from the nature of the relation between husband and wife, from their mutual confidence and their common interests, that the husband, to all outward seeming, would use much of the property as if it were his own. Living under the same roof with his wife, the head of the family, and as solicitous for the material prosperity of his wife as for his own, it would be unavoidable that he should exercise the same care and control over her property as he would over his own, and in the eyes of the public, have the same freedom in its use. We must construe this statute for the protection of married women in accordance with the intent of its framers, and accept all its innovations; and when the legislature has said that a married woman may own a horse in her own right, it is impossible for us to say that if she allows her husband to ride or drive that horse as he would one of his own, she thereby forfeits her title to his creditors. As we have already remarked, such use must necessarily follow from the relation of husband and wife, if such trust and confidence exist between the parties as should exist, and as the law supposes to be implied in that relation.

It may be said that under this construction of the statute the husband, using his wife's property as his own, would be able to obtain a credit to which he was not entitled. This is true, and this consideration was probably not forgotten by the legislature when it passed the law, but that body did not deem the fact that the husband might occasionally obtain an undeserved credit, a sufficient reason for withholding from the wife a just protection in the enjoyment of her own property, and it is simply our province to apply the law as we find it written.

Undoubtedly, the attempt will so often be made to use this

law as a cover for fraud that juries should always exercise a rigid scrutiny in cases of this character. In order to prevent the statute from being thus perverted, we should still hold, as we held in *Wortman v. Price*, 47 Ill. 22, that if the wife places her money in the hands of her husband, to be used by him in trade, it is virtually a loan to him of the money, and his stock in trade would be liable for his debts. So, too, we should hold, as we held in *Elijah v. Taylor*, 37 Id. 249, if the husband by his personal labor raise a crop upon the land of his wife, it would be liable for his debts, subject, probably, to a lien on her part for a reasonable rent, though this point did not arise in that case. But on the other hand, if the wife has invested her money in a farm, and in the stock and implements necessary for its cultivation, which would often be the best mode of providing for her children, we see no reason why she should not employ the aid of her husband in its management, without subjecting her property to execution for his debts.

We are of opinion that the third, fourth, and fifth instructions given for the appellee should have been refused.

For these errors the judgment must be reversed, and the cause remanded.

Judgment reversed.

MARRIED WOMAN, WHETHER RENDERS SEPARATE PROPERTY LIABLE FOR HUSBAND'S DEBTS BY ALLOWING HIM TO HAVE USE AND CONTROL OF IT: See *Levie v. John*, 85 Am. Dec. 49; *Glidden v. Taylor*, 91 Id. 98; *Rush v. Fought*, 93 Id. 769. It does not follow, because a wife merely allows her husband to have a general use and control over her personal property, consistent with their common interests, and the proper enjoyment of it by both, that it should become liable to the payment of his debts: *Primmer v. Clabaugh*, 78 Ill. 96; *Blood v. Barnes*, 79 Id. 438; and see *Walker v. Carrington*, 74 Id. 465; but if she place her separate funds in her husband's hands for the purpose of carrying on any general trade, although in her name, and the husband by his labor and skill increases the funds, the entire capital and the increase will not constitute the separate estate of the wife, but will be liable for the husband's debts: *Wilson v. Loomis*, 55 Id. 356; *Robinson v. Bruns*, 90 Id. 355. The principal case is cited to these propositions.

EYSTER v. HATHEWAY.

[56 ILLINOIS, 521.]

HUSBAND CANNOT SUE ALONE TO ENFORCE HIS WIFE'S RIGHT TO HOMESTEAD, by seeking to avoid a release thereof executed by her, but she should join with him.

CERTIFICATE OF ACKNOWLEDGMENT TO MORTGAGE, RECITING THAT WIFE RELEASED HER HOMESTEAD RIGHT, MAY BE IMPRACHED for fraud, duress, or undue influence, it seems, on a bill in equity filed for that purpose, or, perhaps, by way of defense to a suit to enforce the mortgage.

MONEY BORROWED TO PURCHASE LAND IS NOT PURCHASE-MONEY, within the meaning of the Illinois statute declaring that the homestead right should not be claimed against a debt due for the purchase-money. The statute only applies to persons occupying the relation of vendor and vendee.

BILL in chancery, filed by Samuel Eyster against Elias C. Hatheway and others. The bill alleged that the complainant, Eyster, and his wife, Sarah, had executed and delivered to Joseph C. Hatheway a deed of trust of certain premises, to secure the payment of a sum of money borrowed by Eyster from Hatheway to pay the last installment of the purchase price of the premises, which Eyster had purchased from one Redick; that thereafter Hatheway, pretending that he wished to give Eyster more time, but really desiring to obtain from Eyster's wife a relinquishment of her homestead right, applied to Eyster and his wife to have a new mortgage of the premises executed, and accordingly a new note and mortgage were executed; that the mortgage and certificate of acknowledgment purported to release the homestead right of the wife, but that the officer who wrote the acknowledgment did not ask her whether she voluntarily relinquished such right, nor did he say anything in relation thereto, and that she never intended to relinquish it; and that thereafter, Joseph C. Hatheway pretended to assign the note and mortgage to Elias C. Hatheway, but that there was no valid consideration for such assignment, and it was done to defeat any plea of usury that the complainant might interpose to the payment of the note. The bill sought to impeach the certificate of acknowledgment. The court dismissed the bill on the hearing.

Dwight F. Cameron, for the appellant.

Gray, Avery, and Bushnell, for the appellees.

By Court, WALKER, C. J. Complainant has no separate interest in the premises, or right to its occupancy, that will authorize him to file a bill in his own name to enforce the

right of his wife to the benefit of the homestead act. If Mrs. Eyster and himself have a right to claim the premises as a homestead, they should join in exhibiting a bill for its protection. Unless she were before the court, no decree could be rendered affecting her rights in the premises. If the settlement of her right to hold the homestead is sought, she should have been a complainant in the bill. For this reason, the court below committed no error in dismissing the bill.

If a bill were properly framed, alleging fraud, duress, or undue influence of the husband in procuring her release of the right of homestead, and the bill were sustained by proof, it would seem that a decree might be rendered canceling that portion of the deed and certificate that states that she released her right or claim to the premises as a homestead, or if a bill were filed by the holder of the deed of trust, it might, perhaps, be set up as a defense, but a reformation of a deed could not be had in such a suit, except by a cross-bill. It is a familiar maxim of the law, that fraud avoids all transactions, even records themselves. Then, if a record may be impeached for fraud, no reason is perceived why the certificate of acknowledgment to a deed may not, for the same reason. It was so held in *Louden v. Blythe*, 16 Pa. St. 532 [55 Am. Dec. 527;] *Shroder v. Jameson*, 3 Wheat. 457; *Swift v. Cassell*, 23 Ill. 242. And inasmuch as a deed may be avoided for duress, the same would seem to be true if an acknowledgment of a deed were procured by that means.

It was insisted that the money, to secure which this deed of trust was given, was purchase-money, and the premises, in any event, are liable to be sold for its satisfaction. If it were established that the money borrowed by appellant from appellee was paid to Redick for the land, still it does not follow that it was purchase-money. It appears that the premises were purchased of Redick, and the money for which this debt was incurred was paid on the last installment due on the purchase. The statute, in declaring that the homestead right should not be claimed against a debt due for the purchase-money, obviously used the language in its ordinary and popular signification. All persons understand the term "purchase-money" to mean the price agreed to be paid for the land, or the debt created by the purchase. It is not understood to mean a debt due another person than the vendor. In this case, the debt was created for money loaned, and not for land purchased. Appellee sold no land to appellant, but he loaned

him money. It could not matter, in this indebtedness, whether the money was subsequently paid for the same or other property. There is nothing in the case which shows the relation of vendor and vendee between these parties, and this provision of the statute only applies to parties occupying that relation, or those representing them, and for a debt created by the purchase of the homestead. The decree is affirmed.

Decree affirmed.

CERTIFICATE OF ACKNOWLEDGMENT OF MARRIED WOMAN'S DEED, WHETHER MAY BE IMPEACHED: See *Baldwin v. Snowden*, 78 Am. Dec. 303; *Dodge v. Hollinshead*, 80 Id. 433, and the notes thereto.

PURCHASE-MONEY OF HOMESTEAD, WHAT IS: See *Austin v. Underwood*, 87 Am. Dec. 254, and note. Money borrowed of a third person, and paid out by a purchaser of land, cannot be regarded as purchase-money: *Austin v. Underwood*, 37 Ill. 441; S. C., 87 Am. Dec. 256; *Parrott v. Kempf*, 102 Ill. 427, citing the principal case; but see the principal case distinguished in *Mages v. Mages*, 51 Id. 503; and see *Williams v. Jones*, 100 Id. 365.

REA v. TUCKER.

[51 ILLINOIS, 110.]

DIVORCED WIFE IS INCOMPETENT TO TESTIFY IN BEHALF OF HER FORMER HUSBAND in a suit brought by him against one who had criminal conversation with his wife.

EVIDENCE OF PLAINTIFF'S ADULTERY IS ADMISSIBLE IN MITIGATION OF DAMAGES, BUT NOT AS BAR TO ACTION, where such plaintiff and husband sue another for damages for a criminal intimacy with the wife of the former.

DEFENDANT MAY PROVE, IN MITIGATION OF DAMAGES, THAT WIFE OF PLAINTIFF HAD BEEN GUILTY OF ADULTERY with other persons before her connection with the defendant, where the plaintiff and husband have brought suit against her seducer for damages.

EVIDENCE AS TO CONDITION IN LIFE AND PROXIMATE CIRCUMSTANCES OF RESPECTIVE PARTIES IS ADMISSIBLE in an action for the seduction of either a wife or daughter.

EVIDENCE OF COLLUSION IS BAR TO ACTION WHEN, AND WHEN NOT.—Where a former husband brings suit against the seducer of his divorced wife for damages resulting from such seduction, and the offense of the defendant was the result of collusion between the plaintiff and his wife, or of connivance on the part of the plaintiff, evidence of such collusion would bar the action; but evidence of collusion between the husband and wife in bringing the suit is not admissible in bar of such action.

THE facts are stated in the opinion.

Tanner and Casey, Thomas J. Layman, and Edward V. Pierce,
for the appellant.

By Court, LAWRENCE, J. This was an action brought by Tucker against Rea for criminal conversation with his wife, and resulted in a verdict and judgment for the plaintiff, from which the defendant has prosecuted an appeal. The appellee has filed no brief in this court.

The first reason assigned by appellant for a reversal of the judgment is, that the divorced wife of the plaintiff was allowed to testify, against the objections of the defendant. This was clearly error. The point has been often ruled, and the authorities are cited in 1 Greenl. Ev., secs. 337-342; *Waddams v. Humphrey*, 22 Ill. 661.

It is next urged that the court erred in refusing to permit the defendant to prove the plaintiff had been guilty of adulterous conduct. This error is also well assigned. Lord Kenyon held, in *Wyndham v. Wycombe*, 4 Esp. 17, that where the plaintiff had himself been living in an open state of adultery, he could not maintain this action; but in the subsequent case of *Bromley v. Wallace*, 4 Id. 237, it was held the evidence went only in mitigation of damages. For that purpose it is plainly admissible on the clearest principles of justice, but we see no grounds on which it can be held an absolute bar to the action.

The defendant should also have been permitted to prove for the same purpose—the mitigation of damages—that the wife of plaintiff had been guilty of adultery with other persons before her connection with the defendant: 2 Greenl. Ev., sec. 56, and cases there cited.

The court, however, did not err in permitting the introduction of evidence showing the condition in life and pecuniary circumstances of the respective parties. This was so held in *Grable v. Margrave*, 3 Scam. 872 [38 Am. Dec. 88], in an action for the seduction of a daughter; and the rule is equally applicable to the case at bar. Neither did the court err in refusing to instruct the jury that they must find for the defendant if they believed the plaintiff colluded with his former wife for the purpose of bringing this action. If the offense of the defendant had been the result of collusion between the plaintiff and his wife, or of connivance on the part of the plaintiff, it would have been a bar to the action; but that idea is not expressed by the instruction, which speaks merely of colluding to bring this suit. We are in doubt what was meant by this phrase, and the instruction would have tended to mislead the jury.

For the reasons above given, the judgment must be reversed, and the cause remanded.

Judgment reversed.

HUSBAND AND WIFE, COMPETENCY OF, TO TESTIFY FOR OR AGAINST EACH OTHER AFTER DIVORCE: See notes to *Chamberlain v. People*, 80 Am. Dec. 258; *Smith v. Potter*, 65 Id. 200; *Dickerman v. Graves*, 53 Id. 43. In an action for damages for criminal conversation, by a husband who has obtained a divorce from his wife for adultery with the defendant, the wife is competent to prove such criminal intercourse: See note to *Chamberlain v. People*, 80 Id. 259. As to declarations of wife as evidence in actions of crim. con., see note to *Weaver v. Bachert*, 44 Id. 174.

ACTION FOR SEDUCTION: See extended notes to *Weaver v. Bachert*, 44 Am. Dec. 162-179; *State v. Carron*, 87 Id. 405-411.

SOCIAL POSITION AND PREJUDICIAL CIRCUMSTANCES OF PARTIES, evidence of, when admissible as basis for computation of damages in action for seduction: See note to *Weaver v. Bachert*, 44 Am. Dec. 175; *Grable v. Margrave*, 38 Id. 88; *McAulay v. Birkhead*, 55 Id. 427; extended note to *Ross v. Moses*, 67 Id. 568.

MOSHER v. GRIFFIN.

[51 ILLINOIS, 184.]

ONE WHO TRAINS HORSE FOR RACE, ON WHICH MONEY IS BET, CANNOT RECOVER FOR HIS SERVICES, whether the race is run or not, as such services are in aid of a gaming transaction, which a horse-race is, and which is in violation of law.

HORSE-TRAINER MAY RECOVER MONEY LAID OUT AND EXPENDED FOR FEED AND SHOES for horse, which he is fitting for a race, on which money is bet; for, whether the race is run or not, it is necessary that the animal should be fed and shod, and such items are not necessarily a part of the gaming transaction.

ACTION to recover for services rendered in training a horse for a race, and for money laid and expended for the shoeing and feed of such horse while under training. Verdict for defendant. Judgment upon the verdict. Plaintiff appealed.

Oliver C. Gray, for the appellant.

B. C. Cook, for the appellees.

By Court, BRESE, C. J. We are of opinion the county court decided properly in disallowing the claim of plaintiff for fitting the mare of defendants for a race on which money was bet, though the race was not run. The fitting the mare, — training her, — we suppose, was for the purpose of gaming, which this court has held a horse-race to be: *Tatman v. Strader*, 23 Ill. 494.

The claim, however, for shoeing the mare was not necessarily a part of a gaming transaction, nor was the board of the mare at Mendota; for whether the mare ran the race or not, it was necessary she should be fed and shod.

For these items, the plaintiff was entitled to recover, and they should not have been excluded from the jury. To exclude them from the jury was error, and for the error the judgment must be reversed, and the cause remanded.

Judgment reversed.

HORSE-RACING IS GAMING: See note to *State v. Smith*, 33 Am. Dec. 135; but wagers on horse-races are not illegal in Texas: Note to *Monroe v. Smelly*, 78 Id. 548. Where parties are *in pari delicto*, the law leaves them where it finds them, giving aid to neither: *Pearce v. Foote*, 113 Ill. 244, citing the principal case.

McCARTY v. PEOPLE.

[51 ILLINOIS, 281.]

IN MURDER CASE, EVIDENCE OF DEFENDANT'S GOOD CHARACTER BY GENERAL REPUTATION CANNOT BE REBUTTED BY EVIDENCE OF PARTICULAR ACTS of misconduct or crime, and that by rumors and reports in the country. Every man is presumed ready at all times to defend his general character, but not his individual acts.

McCARTY was indicted for an alleged murder. He was tried, and found guilty of manslaughter. A new trial was denied. Defendant sued out a writ of error, alleging as error the admission, on the trial, of certain evidence in rebuttal, as stated in the opinion.

B. F. Parks, for the plaintiff in error.

R. L. Divine, for the people.

By Court, BREESE, C. J. The only point made on this record deemed necessary to be noticed is, that after the defendant had given evidence of his good character by general reputation, permitting the prosecution to give in evidence particular acts of misconduct or crime in rebuttal, and that by rumors and reports in the country.

Were this the law, no person arraigned for crime, in which his uniform good character prior to the alleged offense, which this court has said is an element proper for the jury to consider in the trial of all offenses, had been established by testimony, would incur the risk attendant upon the production of

such proof, if it could be rebutted by proof of rumors or reports of particular aberrations. Every man is presumed ready at all times to defend his general character, but not his individual acts; of those he must have due notice. No matter how pure one's life may be, he would hardly venture upon the proof if to be followed by such consequences.

We have been referred to no authority allowing such evidence in rebuttal; and on principle we do not think the right to do so can be maintained.

For this error the judgment is reversed, and the cause remanded, that a new trial may be had.

Judgment reversed.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: On the trial of one for manslaughter, the defendant is allowed to give evidence only of his previous general character in regard to peace, quiet, etc., and not proof of particular transactions in which he may have been previously concerned: *Hirschman v. People*, 101 Ill. 574. And particular acts of misconduct are never admissible in rebuttal of proof of the defendant's good character: *Gifford v. People*, 87 Id. 214.

WHITE v. HERMANN.

[51 ILLINOIS, 243.]

DESCRIPTION OF PREMISES IN CONTRACT TO CONVEY LAND WHEN SUFFICIENT. — In a written contract for the sale of land, the premises were described as "the east $\frac{1}{2}$ of N. W. $\frac{1}{4}$, sec. 27, T. 38, 14 E. of 3d P. M." The range and the position of the land to the base line were omitted. *Held*, that this description was sufficient, because a reference to the government land surveys would show that there is no township 38 south of the base line and 14 east of the 3d P. M., and hence, it must be north of the base, and in 14 east of said meridian, which would locate the land in Cook County.

CONTRACT FOR CONVEYANCE OF LANDS IS GOOD AND BINDING, IF THEIR DESCRIPTION IS SUFFICIENT to enable a surveyor to locate them; and this is a question for the jury, to be determined from the evidence, unless it is manifest from the instrument that such lands cannot be located.

COURT WILL NOT PERMIT CONTRACT FOR CONVEYANCE OF LAND TO FAIL, when, from the entire instrument and the general acts of the government, it can be seen what was intended by the parties.

PATENT AMBIGUITY IN WRITTEN CONTRACT FOR CONVEYANCE OF LANDS CANNOT BE EXPLAINED BY EXTRINSIC EVIDENCE.

VALUE OF PREMISES IN ACTION TO RECOVER DAMAGES FOR BREACH OF CONTRACT TO CONVEY LAND MAY BE PROVED BY PLAINTIFF, NOT ONLY BY SHOWING the worth of other property of equal value adjacent to that in controversy, at or near the date of the instrument, but even the value

of lands of a different quality, lying in the immediate vicinity, leaving it for the jury to determine the difference in value.

WHO MAY TESTIFY AS TO VALUE OF PROPERTY.—In an action to recover damages for breach of contract to convey lands, where it is sought to prove their value by showing the worth of adjacent lands, either of the same or of a different quality, any person knowing the property and its value may testify upon that question. The proof of value need not be confined to persons only who are engaged in buying and selling real estate. Such knowledge is not scientific, and is not confined to a few experts.

NUMBER OF WITNESSES WHO MAY BE CALLED TO PROVE VALUE OF PROPERTY IS NOT LIMITED, where that is the issue in the case, either by the power of the court, or by a statute providing that the costs of four witnesses only shall be taxed against the unsuccessful party, unless the court certifies that a greater number is necessary. A party may call a larger number if he is willing to risk the liability to pay their fees. Witnesses may differ materially upon the question of such value, and it is error for the court to refuse to permit a party to call more than four witnesses to prove it; but it may of course exercise a sound discretion, whether it will certify to the necessity of more than four witnesses, and if so, to what number.

THE facts are stated in the opinion.

Consider H. Willett, for the appellants.

Booth, Kreamer, and Hunter, for the appellee.

By Court, WALKER, J. This was an action to recover damages for an alleged breach of contract for the sale of a piece of land. Appellants insist that the contract was written and signed, but was never delivered, nor intended to be delivered, but was accidentally left where appellee obtained possession of the same, and is endeavoring to recover damages for its alleged breach. Appellee, on the other hand, contends that the agreement was fairly entered into, executed, signed, and delivered; and inasmuch as it was never performed, he is entitled to recover the full amount of loss he has sustained by a failure to have the land conveyed.

It is first objected that the contract does not describe the land, and verbal evidence is not admissible for its explanation. If sufficiently described to enable a surveyor to locate it, then the instrument is good and binding; and this is a question for the jury, to be determined from the evidence, unless it is manifest from the instrument that it cannot be located. In reading the description of this land, it seems but natural for any one seeing the subject-matter to which it relates to supply the elipses. It refers to the section, the quarter, the township, by its number and the meridian, but omits to say

that it is north of the base line, or to say that it is of any range, but says it is "14 E. of 3d P. M." When we examine the maps of surveys of public lands, it is discovered that there is no township 38 south of the base, and 14 east of the third principal meridian. Were that meridian extended south thirty-eight townships, and a line were run east of sufficient length to make fourteen townships, it would be found to reach the state of Tennessee, and some eighty or ninety miles east of its western boundary. And we must take notice that government has made no surveys of lands in that state. It must, then, be 38 north of the base line, and in range 14 east of the third principal meridian, which would locate the land in Cook County.

If this is an ambiguity at all, it is a patent one, and would be incapable of an explanation by extrinsic evidence. But courts will never permit an agreement to fail when, from the entire instrument and the general acts of the government, it can be seen what was intended by the parties. In this case, by a reference to the land surveys made by the general government, we can see that there is a tract of land in Cook County which may answer the description, and there can be no other. Although the description is not as full as it could have been made, we must conclude that it was intended to be embraced in the agreement. Hence we have no doubt that the land can be located by the description contained in the agreement sued upon in this case.

It is urged that the court below erred in refusing to permit appellants to prove the value of other adjacent land just before the date of this instrument. As it was important that the jury should be informed of the value of the land in controversy at the time it is claimed to have been sold, we see no objection to permitting proof to be made of the worth of other property of equal quality lying near to and similarly situated to this, at or near the date of the instrument, or even property of different quality in its immediate vicinity, leaving the jury to determine the difference in value. Nor do we understand that, on a question of value of property, no witnesses can be examined but those engaged in buying and selling that species of property, but on the contrary, any person knowing the property and its value may testify. Such knowledge is not scientific, nor is it confined to a few experts. If any individual knows of similar property having been sold about the time of the contract, he may testify to that fact,

and after hearing the opinion of all the witnesses, it is for the jury to weigh the evidence, and as practical men, find its value, giving every part of the testimony such weight as it is entitled to receive.

It is also urged that the court erred in refusing to permit appellants to call more than four witnesses to prove the value of this property. It may be that, on a mere collateral question, the court may have a discretionary power to limit the number of witnesses who may testify on that particular question. We are aware of no rule of practice, however, which authorizes a court to prevent a party from introducing more than four witnesses to prove the issue in the case. It is true, the statute has provided that the costs of four witnesses only shall be taxed against the unsuccessful party, unless the court shall certify that a greater number were necessary, but this in no wise prevents a party from introducing more if he is willing to risk the liability to pay their fees for attendance. It seems to imply that he may call more if he choose to risk such liability.

There are few questions that witnesses are more liable to differ upon than the value of property at a given time, especially if real estate, or property not daily bought and sold in the market. This being the case, it must be necessary that the parties be permitted to call a larger number than four witnesses to prove its value. Nor are we prepared to hold in such a case that a court has the power, on such a question, to limit the number which may be examined by either party, but the court would of course determine, in the exercise of a sound discretion, whether he would certify to their necessity, and if so, to what number. In this there was error, and the judgment of the court below must be reversed, and the cause remanded.

Judgment reversed.

DESCRIPTION IN DEED SUFFICIENT TO PASS TITLE: See *Alexander v. Miller's Ex'rs*, 70 Am. Dec. 314, note 318. When insufficient: *Caldwell v. Center*, 89 Id. 131.

PATENT AMBIGUITIES IN WRITTEN INSTRUMENTS CANNOT BE EXPLAINED BY EXTRINSIC EVIDENCE: See *Marshall v. Haney*, 59 Am. Dec. 92; *Newcomer v. Kline*, 37 Id. 74; but parol evidence is admissible to explain a latent ambiguity therein: *Bowen v. Slaughter*, 71 Id. 135; *Walker v. Wells*, 71 Id. 164; note to *Marshall v. Haney*, 59 Id. 101; note to *Prentiss v. Brewer*, 86 Id. 735.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: As to weight of evidence, where there is equal credibility, superior opportunity and intelligence is entitled to the greater weight:

Johnson v. Freeport etc. R'y Co., 111 Ill. 413. Where real estate sold has no regular market value, actual sales of property in the vicinity, and near the time of the first sale, are competent evidence as far as they go. On cross-examination, all circumstances can be drawn out, showing that the given sale fails, and for how much, of being a fair criterion of value: *Provision Co. v. City of Chicago*, 111 Id. 654. As to identity, see *McNitt v. Turner*, 16 Wall. 365.

BARNET v. FERGUS.

[51 ILLINOIS, 352.]

MORTGAGE OF STOCK OF GOODS IS FRAUDULENT AND VOID AS TO CREDITORS, where it contains a provision authorizing the mortgagor to retain possession for the purpose of selling in the usual course of trade.

CHATTEL MORTGAGEE'S PERMISSION FOR MORTGAGOR TO SELL IN ORDINARY COURSE OF TRADE, EFFECT OF. — Though a chattel mortgage on a stock of goods contains no provision authorizing the mortgagor to retain possession for the purpose of selling in the usual course of trade, yet if the mortgagee knowingly permits the mortgagor to make such sale, and in the same way as before the mortgage was made, it is a perversion of the mortgage from its legitimate purposes, sufficient to withdraw from its protection, and place within the reach of other creditors all of the property which the mortgagee had permitted the mortgagor to hold for sale in the ordinary course of his business.

SUBSEQUENT ACTS OF CHATTEL MORTGAGEE MAY INVALIDATE HIS MORTGAGE IN PART WITHOUT RENDERING IT VOID IN TOTO; as where a chattel mortgage covers different kinds of property, such as a stock of goods in a store, held for the purposes of trade, and a number of horses upon a farm; the fact that the mortgagee loses his lien as to whatever goods he permits the mortgagor to keep for sale does not render the mortgage invalid as to the horses.

FACT THAT CHATTEL MORTGAGEE PERMITS MORTGAGOR TO CONTROL PORTION OF MORTGAGED PROPERTY in a manner inconsistent with his rights as a mortgagee does not of itself invalidate the instrument as to other property not so controlled. At most, it is only a circumstance which may be considered by the jury, in connection with other facts, in determining the good faith of the transaction, in finding out whether the mortgage was originally made to defraud creditors, in which case it would, of course, be void as to both classes of property.

CHATTEL MORTGAGE VOID AS TO PART, BUT VALID AS TO REMAINDER. — A chattel mortgage, valid upon its face and at its inception, covered a printing-press and its appurtenances, and certain books and blanks, which had been printed by the mortgagor, and which were held by him for sale. The mortgagor continued, with the mortgagee's knowledge, to sell such books and blanks in the same way after the mortgage was made as before. *Held*, that the mortgagee lost his lien as against creditors, so far as the books and blanks were concerned, but not as to the printing-press and its appurtenances.

REPLEVIN by A. Barnett against Fergus and Beveridge, sheriff, etc., to recover of them the possession of certain

printing materials, printing-presses, and stock in trade of J. Barnet, which the sheriff had levied upon as the property of J. Barnet, under and by virtue of an execution issued upon a judgment in favor of Fergus, for \$1,861, and costs, which he, Fergus, had obtained in the superior court of Chicago, against J. Barnet, on the third day of October, 1867. The execution so issued was dated November 7, 1867, and was returned executed November 13, 1867. It appeared from the record that J. Barnet executed a mortgage, on August 6, 1867, to A. Barnet, to secure the sum of \$1,980, with interest thereon, upon the printing materials, presses, and stock in trade then belonging to J. Barnet. The chattel mortgage covered the same property that was levied upon under the execution. It also appeared that A. Barnet permitted J. Barnet to sell, in the ordinary course of trade, from his stock in trade so mortgaged, and this was claimed as a waiver of his lien upon the entire property. This stock in trade seems to have been certain books and blanks which J. Barnet then had on hand, and which he printed from time to time. There was a judgment for the defendants, and the plaintiff appealed. The single point of controversy was, whether the mortgagee, by permitting the mortgagor to sell, in the due course of trade, a certain portion of the mortgaged property, lost his lien upon the residue.

W. T. Burgess, for the appellant.

Hervey, Anthony, and Galt, for the appellees.

By Court, LAWRENCE, J. It was held in this court, in *Davis v. Ransom*, 18 Ill. 402, and in *Read v. Wilson*, 22 Id. 380 [74 Am. Dec. 159], that a mortgage of a stock of goods, containing a provision authorizing the mortgagor to retain possession for the purpose of selling in the usual course of trade, was fraudulent and void as to creditors. This was held to be fraud in law. It is a necessary consequence of these decisions that, where the mortgage contains no such provision, but the mortgagee nevertheless knowingly permits the mortgagor to make sale of the property in the ordinary course of trade, and in the same way as before the mortgage was made, this would be such a perversion of the mortgage from its legitimate purposes as to withdraw from its protection, and place within the reach of other creditors, all of the property which the mortgagee had permitted the mortgagor to hold for sale in the ordi-

nary course of his business. This principle has been recognized in *Griswold v. Sheldon*, 4 N. Y. 580, and *Delavan v. Ensign*, 21 Barb. 88. The case of *Ogden v. Stewart*, 29 Ill. 124, quoted by counsel for appellee, is hardly in point, as that was decided on the ground that the mortgagee, having knowingly permitted the mortgagor to make previous sales, must be considered, in a contest with a purchaser of the remnant of the goods, to have waived the provision in the mortgage authorizing him to take possession in case the mortgagor should attempt to sell. The court simply held there was an implied authority from the mortgagee to make the sale, and therefore he could not object to it.

But it does not follow, from the principle above laid down, that where a mortgage covers different kinds of property, as, for example, a stock of goods in a store, held for the purposes of trade, and a parcel of horses upon a farm, because the mortgagee loses his right to enforce his mortgage as against creditors or purchasers in regard to the goods, he has therefore lost it in regard to the horses. It is to be remembered that the mortgage, in the case supposed, as in the case at bar, is a valid instrument upon its face and at its inception. But the mortgagee may lose his right to enforce it by subsequent acts, and he does so in regard to so much of the property as he permits the mortgagor to keep for the purposes of sale. But such subsequent acts in regard to a portion of the property do not necessarily render the mortgage void *in toto*. It may become invalid as to a part of the mortgaged property, and remain valid as to the residue. In the case above supposed, because the mortgagee has consented that the mortgagor shall sell his stock of goods, it would be extremely unreasonable to tell him he could not enforce his lien against the horses. The utmost that could be said to his injury would be, that where the *bona fides* of the mortgage come in question, the fact that he has permitted the mortgagor to use the goods in a manner inconsistent with his own rights as mortgagee is a circumstance which a jury would have a right to consider in determining the question whether the mortgage was originally made to defraud creditors, and is therefore equally void as to both goods and horses. The degree of weight to be given to this circumstance would, of course, greatly depend upon the other evidence in each case. Taken by itself, and with no other circumstances to throw discredit upon the mortgage, it would merely show that the mortgagee had consented to release the goods from

the lien of his mortgage, thereby impairing his own security to that extent, but would by no means justify the inference that he intended to abandon his lien upon the horses.

Applying these principles to the case at bar, we do not find it difficult of decision. The mortgage covered a printing-press and its appurtenances, and certain books and blanks which had been printed by the mortgagor, and which were held by him for sale. The evidence shows he continued, with the knowledge of the mortgagee, to sell these books and blanks in the same way after as before the mortgage was made. As to these, the other creditors had a right to insist the lien of the mortgage, as against themselves, was lost. But not so as to the printing-press and its appurtenances. The mortgagee had consented to nothing, in regard to that portion of the property, inconsistent with his position and rights as mortgagee. He had a right to relinquish his lien upon the books without losing that upon the press, and such relinquishment is of itself but very slight evidence of a fraudulent intent in making the mortgage. It is not claimed that the debt was not honestly due the mortgagee, and the court should have found for the plaintiff as to all the property except the books and blanks.

For this reason the judgment must be reversed, and the cause remanded.

Judgment reversed.

EFFECT OF CHATTEL MORTGAGOR REMAINING IN POSSESSION, either by the terms of the mortgage or by agreement, or by permission of the mortgagee: *Conkling v. Shelley*, 84 Am. Dec. 348, note 351; note to *Godchaux v. Mulford*, 85 Id. 187.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: Chattel mortgages containing clauses authorizing the mortgagor to sell and replace the property are void as to creditors: *In re Forbes*, 5 Biss. 512; *In re Kahley*, 2 Id. 387. So where the mortgagee permits the mortgagor to sell in the usual course of business: *City National Bank v. Goodrich*, 3 Col. 139. The principal case was cited to the fourth point of the syllabus, *supra*, in *Goodheart v. Johnson*, 88 Ill. 61, and distinguished in *Garrettson v. Pegg*, 64 Id. 113. Mortgage may be void in part and valid in part: *In re Kahley*, 2 Biss. 387. The principal case was referred to in *Robinson v. Elliott*, 11 Nat. Bank. Reg. 561; S. C., 22 Wall. 526.

SNYDACKER v. BROSSÉ.

[51 ILLINOIS, 257.]

FOR PURPOSE OF EXECUTING CIVIL PROCESS, NO OFFICER HAS LEGAL AUTHORITY TO BREAK OUTER DOOR, or other outside protection to a person's house.

AFTER HAVING PEACEABLY EFFECTED ENTRANCE INTO DEFENDANT'S HOUSE, an officer may, in the execution of civil process against his goods, after a request and refusal, break open any inner doors belonging to him, in order to take the goods.

RULES STATED AS TO BREAKING OPEN DOORS IN EFFECTING ARREST EITHER ON CIVIL OR CRIMINAL PROCESS.

LAW DOES NOT AUTHORIZE PERSON TO EXECUTE PROCESS IN HIS OWN FAVOR.

LIABILITY OF OFFICER FOR ABUSE OF PROCESS. — If an officer armed with a writ abuses it by the commission of any act not warranted by the process, he thereby becomes a trespasser *ab initio*, and is liable, not only for the property taken by him, but also for any damage which was the immediate result of his acts.

PLAINTIFF IN EXECUTION IS EQUALLY LIABLE WITH OFFICER FOR ABUSE OF PROCESS BY LATTER, if he command or advise such abuse; and he is liable in trespass for his act, not only where the proceedings are irregular, or where the court has no jurisdiction, but also in a case where all the proceedings are regular, and where he would not, except for such abuse, incur liability.

IT IS ERROR TO ADMIT HEARSAY EVIDENCE TO PROVE THAT ONE AIDED, ADVISED, OR ABETTED OFFICER TO ABUSE HIS POWER.

MISLEADING INSTRUCTIONS TO JURY SHOULD BE EXPLAINED OR MODIFIED, OR BE REFUSED.

AFFIDAVIT AS TO OWNERSHIP OF PROPERTY RAISES NO ESTOPPEL FROM SUING FOR DAMAGE TO IT WHEN. — An affidavit in replevin, made by a wife, stated that the property belonged to her husband. In an action afterwards brought by her for damage done to such property, it was objected that, by reason of such affidavit, she was estopped from maintaining the suit. *Held*, that although the affidavit was strong evidence to prove that the property belonged to her husband, yet it could not be considered as conclusive; that she might explain the affidavit as to the ownership of the property; and that it was for the jury to determine the sufficiency of such explanation.

THE facts are stated in the opinion.

Rosenthal and Pence, for the appellant.

A. N. Waterman, for the appellee.

By Court, WALKER, J. It appears that appellant, in July, 1868, recovered a judgment, before a justice of the peace, for one hundred dollars, against appellee and one Richards. An execution was issued thereon, and in September of that year, Comfort, a constable, and one of the defendants below, levied the execution upon a portion of appellee's household goods, and took charge of them. Appellee was, at the time, conduct-

ing business as a *feme sole*, lived alone, and as an unmarried woman, and acquired the property levied upon while thus living separate and apart from her husband, with whom she had not lived for about two years. They, it seems, had ceased to live together by mutual consent.

After the levy was made, she filed an affidavit before a justice of the peace, in which she claimed the goods belonged to her husband, and caused them to be replevied in his name, and Snyder and Comfort were made defendants. On a trial of that case, a judgment was rendered in favor of the defendants, and the goods ordered to be returned, and a writ was issued therefor. Comfort took the writ, went to the house, and carried away the property levied upon, and some articles which had not been seized on the execution.

Some two or three days after the goods were removed under the writ of *retorno habendo*, appellee's attorney called upon Snyder, who compromised his judgment by receiving eighty dollars, and then giving an order on Comfort to return the property to appellee, which he did, except a blanket and a comfort, which it is claimed were taken, but not returned.

It appears that the constable used great expedition in executing this writ, only a few hours intervening after the rendition of the judgment in the replevin suit until he had, in the absence of appellee, entered her house and seized the goods and carried them away.

It is claimed that Comfort executed the writ in the most reckless manner, after entering the house, by handling the goods in a rough and improper manner, and carrying them away exposed to a severe rain, whereby they were greatly injured; also that he forced open an outer door, or a window, to effect an entrance. There is evidence tending to prove that this writ was executed in the manner charged, and the jury have so found. It also appears, from the quantity of household property removed, that her business of a boarding-house keeper was suspended.

To recover damages for the wrongful entry into the house, and the abuse of power, if any was possessed, by Comfort, after making the entry, this suit was brought; and on a trial in the court below, the jury found a verdict for nine hundred dollars damages, from which Snyder has prosecuted this appeal.

The defense interposed was the general issue, and a justification under the original writ of *forci facias*, and the writ of *retorno habendo*.

It is a uniformly recognised rule of the common law that no officer has the legal authority to break an outer door, or other outside protection to an individual's house, for the purpose of executing civil process. Even to arrest a defendant of civil process the officer must corporally seize or touch the defendant's body, and thus render him a prisoner, before he can justify the breaking and entering the defendant's house to retake him; otherwise, he has no such power, but must watch his opportunity to arrest him; for every man's dwelling-house is looked upon by the law as his castle of defense and asylum, wherein he should suffer no violence: 3 Bla. Com. 288. And in the execution of civil process against the goods of a defendant, an officer is equally powerless to force an entrance into the house of the defendant, for the purpose of seizing them. Blackstone says a sheriff may not break open any outer doors to execute either a *fiery facias* or a *capias ad satisfaciendum*; but he must enter peaceably, and may then, after a request and refusal, break open any inner doors belonging to the defendant, in order to take the goods: 3 Id. 417. And what is said of these writs is believed to be true of all civil process; and it follows that the writ of *retorno habendo* conferred no right on any constable to break an outer door or a window to effect an entrance into appellee's house. On a warrant for the arrest of a person charged with a felony, it is otherwise, as the officer may then break open doors, if necessary, to make the arrest: 4 Id. 292.

In this case, however, there is a fatal objection to the justification, by Comfort, under the writ of *retorno habendo*, as it was in favor of himself and Snyderacker. We are aware of no case in which the law authorizes a person to execute process in his own favor. To permit such a course of practice would lead to great oppression, wrong, and irregularity. The law has wisely intrusted the decision of disputes between citizens to persons wholly disinterested and free from bias and the acrimony of feeling so frequently, if not uniformly, engendered by litigation; and the same is equally true of the persons selected to execute the process necessary to the adjustment of such disputes. The law will not intrust the power to a person to render or execute a judgment in his own favor. The writ of *retorno habendo*, therefore, could form no justification for any act done under it by Comfort, whatever it might have been to any other constable having no interest in the litigation. But

we have seen that it would have justified no one in breaking outer doors to execute it.

We now come to consider the question whether the constable was justified, under the *feri facias*, in forcibly entering the dwelling of appellee by breaking the doors or windows for the purpose of seizing the goods. We have seen that he possessed no more power to do so under this than the other. Under it, he could, no doubt, without the writ of *retorno habendo*, have seized the goods under the first execution, or even by virtue of the first levy. Doing so, he should have gained a peaceable entrance into the house; and if inner doors had been closed so he could not seize the goods, then he should have demanded that they be opened, and failing to be opened, he might break them, and seize the goods. To this extent the *feri facias* would have justified him. But even then, he could not use the writ as a mere pretext for wanton and unnecessary injury, or only for malicious purposes.

Although Comfort was armed with the writ, yet if he abused it by breaking open an outer door or window, or committing any other act of trespass not warranted by the process, he thereby became a trespasser *ab initio*: 1 Chit. Pl. 185. If, then, Comfort committed a trespass in entering the house, he is liable as a trespasser, and must respond for the damages ensuing from his unlawful act. It would therefore follow, if he so entered, that he is liable for any damage he may have done to the property returned, or for the value of any which he may have wrongfully detained and failed to return, as well as for any damage which was the immediate result of his acts.

We now come to consider the question whether a plaintiff in execution is liable for the abuse of process by an officer. The books lay it down as a rule that, when the court has jurisdiction, but the proceeding is irregular, trespass against the attorney and the plaintiff is the proper remedy, as, where the judgment has been set aside for irregularity, trespass is the appropriate action for any act done under it: 1 Chit. Pl. 184. And when the court has no jurisdiction over the subject-matter, trespass is the proper form of action against all the parties for acts done under such proceedings: 1 Id. 182. And there can be no doubt that a plaintiff, in a case where all the proceedings are regular, is equally liable with the officer, if he command or advise the abuse of process; although otherwise he would not incur liability. He, like any one else, must

be held responsible for aiding, advising, or abetting an officer to abuse his power.

In this case, however, there is no pretense that the justice of the peace did not have jurisdiction of both the subject-matter and the person of appellee, nor is it contended that the execution on that judgment was not in all respects regular. This being so, it was necessary to prove that Snyderdacker advised, directed, or encouraged the abuse of the process complained of by appellee, or knowing of its abuse, and for his own benefit, ratified it; and this should have been proved by legitimate evidence. But it was not a legitimate mode of proving that Snyderdacker was a party to the trespass by introducing evidence of what Comfort said in reference to Snyderdacker's connection with the matter, when he was not present. Richards swore that Comfort stated to him, in the absence of Snyderdacker, that the latter told the former what he should do in reference to the levy; and appellee testified that Comfort said to her that Snyderdacker said he would take the law into his own hands, but that the latter was not present at this conversation. This evidence was admitted against the objections of appellant. This was but hearsay evidence, and was clearly inadmissible. It no doubt made a strong impression upon the minds of the jury, and may have operated prejudicially to appellant. In its admission the court erred.

Appellee's sixth instruction should have been modified or refused. It nowhere distinguishes between the lawful and unlawful acts of Comfort, nor does it leave it to the jury to find whether Comfort had committed a trespass, or had abused the process. This may have tended to mislead the jury.

It is urged that appellee, having sworn, in her affidavit, that the property was her husband's when she commenced the replevin suit, is estopped from now suing for any damage to it. Such an affidavit is, no doubt, strong evidence to prove that the property belonged to her husband, but at the same time it is not conclusive. She might, if she could, explain the affidavit, and show that the property belonged to her; and it is for the jury to say, from all the circumstances, whether she succeeded in the proof.

As the case must go to another jury, we deem it improper to discuss the question whether the damages are excessive.

For the errors indicated, however, the judgment of the court below must be reversed, and the cause remanded.

Judgment reversed.

BREAKING OPEN DOORS TO EXECUTE WRIT: See note to *Keith v. Johnson*, 25 Am. Dec. 167-171, where the whole subject is discussed; *Burton v. Wilkinson*, 46 Id. 145; *Wiley v. Nichols*, 22 Id. 425; *Swain v. Miner*, 69 Id. 244.

BREAKING OPEN DOORS TO EFFECT ARREST, in execution of either criminal or civil process: See extended note to *Hawkins v. Commonwealth*, 61 Am. Dec. 155, 156; *McLennon v. Richardson*, 77 Id. 353.

LIABILITY OF OFFICER FOR ABUSE OF PROCESS: See *Paul v. Slason*, 54 Am. Dec. 75; *Breck v. Blanchard*, 51 Id. 222; note to *Hooker v. Smith*, 47 Id. 682; extended note to *Barrett v. White*, 14 Id. 365-369, discussing the subject. As to joint liability of creditor for officer's abuse of process, see *Abbott v. Kimball*, 47 Id. 708.

ACTION AGAINST OFFICER FOR FAILURE TO TAKE PROPER CARE OF ATTACHED PROPERTY: See note to *Abbott v. Kimball*, 47 Am. Dec. 711.

HEARSAY TESTIMONY IS NOT ADMISSIBLE: *Lynch v. Postlethwaite*, 12 Am. Dec. 485.

MISLEADING INSTRUCTIONS TO JURY SHOULD BE EXPLAINED OR MODIFIED, OR BE REFUSED: See extended note to *Strohn v. Detroit & M. R. R. Co.*, 94 Am. Dec. 564.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: It is the common-law rule that an officer shall not decide his own case or execute process in his own favor: *O'Connor v. Wilson*, 57 Ill. 234; *Hammers v. Dole*, 61 Id. 310. Where a valid writ is executed in such manner as to show a willful abuse of it, the officer and his assistants are to be treated as trespassers *ab initio*: *Haskins v. Haskins*, 67 Id. 454.

JONES v. McGUIRK.

[51 ILLINOIS, 322.]

OFFICER CANNOT OBJECT FOR FIRST TIME ON APPEAL THAT THERE WAS NO PROOF OF HIS OFFICIAL CHARACTER in the lower court, on the trial of an action against him to recover for damages arising to property while in his custody, and by reason of his neglect. The objection should first be made in the court below, so as to give an opportunity to obviate it by proof.

SERVICE OF PROCESS IN REM SHOULD BE MADE OPENLY, AND WRITTEN NOTICE LEFT WITH PERSON IN POSSESSION; and the officer's acts of custody and control should be exercised in such an open and visible manner, by a custodian or otherwise, that the person having the thing in charge may take the necessary steps to protect the rights of all those interested in it.

UNITED STATES MARSHAL MAY ATTACH PROPERTY WITHOUT SEEKING IT OR TOUCHING IT. His duty is performed by taking it into his custody, not *manu forti*, but by placing some person in charge, and making a return on the writ. The marshal thenceforth becomes chargeable with its safe-keeping.

DUTY AND LIABILITY OF UNITED STATES MARSHAL WITH RESPECT TO PROPERTY IN HIS CUSTODY.—Where he has taken property into his custody under a process *in rem* issued out of an admiralty court, the owner is relieved of all concern about it, and is not required to be pres-

ent to protect it. The sole responsibility of its safe-keeping is upon the officer; it is his duty to use due diligence to keep it safe, and he will be liable to the owner for any damage to the property resulting from a want of such diligence.

"DUE DILIGENCE" REQUIRED OF OFFICER IN TAKING CARE OF PROPERTY ATTACHED under process *in rem* is such diligence as a careful, prudent man, of reasonable sense and judgment, might reasonably be expected to take if the property belonged to himself.

UNITED STATES MARSHAL ALONE IS LIABLE FOR NEGLIGENCE AND INJURIOUS ACTS OF HIS DEPUTY or assistants in taking care of attached property.

DUTY AND LIABILITY OF UNITED STATES MARSHAL AS TO STEAM-TUG TAKEN BY HIM UNDER PROCESS IN REM. — If he puts the tug in charge of a custodian, and while so situated, it springs a leak and sinks, for want of proper care and attention on the part of the custodian, the marshal is liable to the owner as well as to the libellant for the damage occasioned thereby. Due diligence requires that the officer should know whether the vessel leaks; whether the place she occupies is a proper one; whether, in the removal of pipes which are taken out by the direction of the custodian, any holes have been left through which water may enter the vessel; what bad effect ice may have upon her, which may be avoided, it being in the winter season, and what will be her condition in case of a sudden rise of water and breaking up of the ice.

THE facts are stated in the opinion.

Sleeper, Whiton, and Durham, for the appellant.

William H. Coudon, for the appellee.

By Court, BREESE, C. J. This was an action on the case, brought to the superior court of Chicago, by James McGuirk, against Joseph R. Jones, to recover damages for negligence in regard to a steam-tug called *Ada Allen*, which he, as marshal of the United States for the northern district of this state, had attached on process issued out of that court, in a case in admiralty, in which John Rigg was libellant, and this tug defendant.

The jury found for the plaintiff, and assessed the damages at \$1,375, for which the court rendered judgment; and to reverse which this appeal is taken.

The declaration alleges that appellant was, on the twenty-second day of November, 1866, the marshal of the United States for the northern district of Illinois, and as such seized, attached, arrested, and took possession of this tug, owned by appellee, and retained possession until she was bonded out of the marshal's custody; that it was appellant's duty, as marshal, in consideration of the emoluments of his office, to use great care, skill, and attention in the protection and preser-

vation of the tug, against dangers, damage, and deterioration, etc., but by his negligence, etc., the tug, in the month of February, 1867, and while in appellant's possession as marshal, became filled with water, and sunk in the Chicago River, and was left there by appellant two months, and until she was raised by appellee, and bonded; claiming damages by reason of injuries thereby occasioned to the tug, and for depriving him of the use for two months, and prevented thereby from making gains and profits, and for his expenses incurred in repairing the injuries done.

The process which issued out of the district court was in a proceeding *in rem*, against the vessel, and commanded the marshal to attach her, together with her tackle, apparel, etc., and detain her in custody until the further order of the court, and to give notice to all persons claiming her, etc.

The return to the process, that he had executed the writ by attaching the tug, her tackle, apparel, and furniture, etc., on the twenty-second day of November, 1866, and still detained the same in his custody, was made on the fourth day of February, 1867, and was signed, "J. R. Jones, U. S. Marshal; A. E. Cotes, Deputy."

The first point appellant makes is the want of proof that he was marshal at the time, and that Cotes was his deputy. A sufficient answer to this is, that this point was not made in the court below. The case proceeded to judgment on the fact that appellant was marshal, his official character not having been called in question. Had it been, the proof could easily have been made that he was at the time acting as such, and that Cotes was acting as his deputy. There was no pretense that these persons were not the officers the papers from the district court and in evidence represented them to have been at the time the writ was issued, executed, and returned. In addition to these papers, the bond of appellee was put in evidence, which had been approved by the district court, dated May 28, 1867, for the purpose of releasing the vessel, which recites that Cotes had executed the writ as one of the deputies of the marshal.

The process under which the marshal acted was *in rem*, which is founded on a right in the thing, and the object of the process is to obtain the thing itself, or a satisfaction out of it, for some claim resting on a real or *quasi* proprietary right in it, and a court of admiralty, through its process, arrests the thing for the purposes of satisfaction. It holds its possession

by its officers, and the property, in contemplation of law, is in the custody of the court itself.

The proceeding is based on the assumption that the owners and other persons interested in the property have it in their own charge, or have placed it under the control of others, who will see to their interests whenever process shall be served upon it. The process commands the marshal to notify all parties. It is his duty, therefore, to make the service openly, to leave a written notice with the person in possession, and to exercise his acts of custody and control in such an open and visible manner, by a custodian, or otherwise, that the person having the same in charge may take the necessary steps to protect the rights of all those interested. Was not this duty performed by appellant?

It is true, as appellee testified, he did not see the marshal at all; nor was it necessary he should have seen him. The process was not against appellee, but against the tug. All that was necessary was, that the marshal should attach it; and this he could do without seeing it or touching it. His duty was performed by taking it into his custody, not *manu forti*, but by placing some person in charge, and making a return on the writ. The marshal becomes, thenceforth, chargeable with its safe-keeping: Conkling's Treatise, 361. Gilbert was found in charge, giving directions about moving certain articles from it; and it is a fair inference he was put in charge by the marshal. To overcome this presumption, how easy was it for appellant to have called Gilbert. Besides, the return shows appellant had taken the vessel in his custody; and fees are chargeable for it, which will, no doubt, appear in the cost bill, which may be issued on the determination of the cause in the district court. The return shows the tug was in appellant's custody on the 4th of February, 1867, which was manifested in an open, visible manner, by a custodian.

But appellant insists, as the vessel was not moved from the dock where her owner had placed her, and he removed the furniture, the steam and other pipes, and the bedding, that is evidence she was in his care all the time. The testimony is, that these things were removed by direction of the custodian, and deposited in the hold of a bark moored alongside, in which the custodian lived.

What, then, was the legal duty of appellant, he having this boat in his custody? The office of marshal is one of great trust, and he is clothed with vast powers for good or for evil,

and public policy, if no other consideration, requires he should be responsible for all the injury he may do in his office. If the injury proceeds from an act of the deputy or other person assisting him in the performance of his duty, the marshal alone is immediately responsible to the injured party.

It was the duty of the marshal, then, to use due diligence to keep this vessel safely: *Eames v. Hennessy*, 22 Ill. 628. Due diligence is understood to be such as a careful, prudent man, of reasonable sense and judgment, well acquainted with the condition of his property, might reasonably be expected to take if the vessel belonged to himself. He should know whether she leaked; whether the place she occupied was a proper one; whether, in the removal of the pipes, any holes had been left open through which water might enter the vessel; what bad effect ice might have upon her which might be avoided; what would be her condition in case of a sudden rise of water and breaking up of the ice.

That no care whatever was bestowed upon this boat is shown by all the testimony. She went down gradually; was three days sinking, upon any one of which one man, with a common tin pump, could have relieved her in a few hours, as she could have been bailed out in a short time. A passer-by, seeing her condition, said to a man there: "She has sprung a leak," and the reply was, he thought she had. Whether this was the custodian or not, does not appear; but some one should have been there representing the marshal, to know her condition and guard against accidents, and with an eye to her protection and safety.

The case is not at all like ordinary cases of a levy upon personal property by a sheriff or constable, or process in a personal action. Hence the law required the marshal to take the property into his custody. Failing to do so, or to appoint a fit custodian, he must be responsible for the consequences.

The appellant insists that if he is responsible at all, it is to the libellant, and not to the owner. This proposition is too absurd to require refutation. He was bound to both.

But it is said appellee had no right to leave his vessel and go to Ohio after she was attached,—he was bound to be there to protect her. We have shown the boat was in the custody of the marshal, and being so, the owner was relieved from all concern about her. It was his good fortune, perhaps, that the boat was in custody during the winter months, when she

could not be used, and under the responsibility of the marshal.

But if the libellant did not wish to run the hazard of a loss to himself, by reason of the decay or liability to injury of the boat, as a court of admiralty is always open, that court would, no doubt, on his application, have ordered a sale of the vessel, the proceeds thereof to be brought into court to abide the event of the suit. These proceeds would become the substitute of the thing itself. But this in no degree relieves the officer of the liability imposed upon him by law to use due diligence to preserve the property.

We will not discuss the instructions, passing them by with the remark, they were correctly disposed of by the court.

The question of reasonable care and diligence was fairly submitted to the jury under them, and the evidence sustains the verdict.

Much has been said about the process of salting vessels, and the expense attending it.

The evidence is, this boat was salted when built, which was but a few months before she sunk; that she cost ten thousand dollars; that her hull and all her parts were staunch and sound; that she could earn, in towing, from forty-five to fifty dollars a day; that, from experiments made, the salt had been worked out of her while she was submerged, before it could have taken much effect upon the timbers; that to resalt her, her sides, planking, or some of it, would have to be stripped, and the cost would be heavy; and that salt tends to preserve the timbers.

Taking into consideration the expense of raising the boat, cleaning her, refitting her, the loss of her salting, the loss of her services for two months at least, the verdict is not too much, and might well have been more.

The judgment must be affirmed.

Judgment affirmed.

VALID ATTACHMENT, WHAT CONSTITUTES, WITH RESPECT TO TAKING POSSESSION: See *Odiome v. Colley*, 9 Am. Dec. 30; *Hollister v. Goodale*, 21 Id. 674, extended note thereto, 677-680; on what is necessary to attach personalty: *Nichols v. Patten*, 36 Id. 713.

OFFICER'S LIABILITY FOR ACTS OF HIS DEPUTY: See *Barton v. Wilkinson*, 46 Am. Dec. 145; *Hooker v. Smith*, 47 Id. 679; *Hamard v. Israel*, 2 Id. 468; *Fureythe v. Ellis*, 20 Id. 218; *State v. Moore*, 12 Id. 563; *Whitney v. Butterfield*, 73 Id. 584.

HAMILTON v. LUBUKEE.

[51 ILLINOIS, 415.]

IF ADVERTISEMENT OR NOTICE OF SALE UNDER POWER OF SALE contained in a mortgage describes a different and other or larger indebtedness than that described in or secured by the mortgage, the sale is not rendered invalid, if it is not shown that the property was injuriously affected, or bidders deterred from attending the sale, or that the notice was published for a fraudulent purpose; or if so, that defendants participated in it, or had any knowledge of it.

ASSIGNMENT OF MORTGAGE CONTAINING POWER OF SALE, by indorsement on the mortgage without an assignment of the note, will not operate to vest the power of sale in the assignee. As the mortgage is not an assignable instrument by indorsement, either by common law or under the statute, the power to sell remains in the mortgagee.

ASSIGNMENT OF NOTE SECURED BY MORTGAGE containing power of sale vests the power of sale in the assignee.

PURCHASER AT SALE UNDER POWER CONTAINED IN MORTGAGE is chargeable with notice of defects and irregularities attending the sale, and cannot evade their effect.

REMOTE AND INNOCENT PURCHASERS FOR VALUABLE CONSIDERATION from purchaser at sale under power contained in mortgage are not chargeable with notice of irregularities or equities attending the sale. These are matters *in pais*, which must be brought home to their knowledge on a proper case made, and sustained by proof.

AS TO REMOTE AND INNOCENT PURCHASERS FROM PURCHASER at sale under a power contained in a mortgage, the record of the mortgage is notice to them only of the facts stated therein. It is not notice of any irregularities attending the sale.

MORTGAGOR ON OBTAINING KNOWLEDGE OF SALE UNDER POWER contained in the mortgage must immediately take steps to set it aside for irregularities attending it, or a ratification by him will be implied. Four years after he has knowledge of the sale and proceedings, and has remained inactive, thereby acquiescing and encouraging purchasers, is too late to redeem, and he is barred of his right.

THE opinion states the facts.

Redfield and Crocker, for the appellant.

Rosenthal and Pence, and Steele, for the appellees.

By Court, BREESE, C. J. This was a bill in chancery exhibited in the Cook circuit court by Edward Hamilton, complainant, against Ferdinand Lubukee, Nathan Eisendrath, Godfrey Snyderacker, and Moses Snyderacker, members of the firm of Eisendrath & Co., and others, seeking to redeem certain lots, or parts of lots, in the city of Chicago, which were sold by Lubukee, under a mortgage executed by complainant and one Willard M. Fuller to Lubukee, to secure the payment of four certain promissory notes, amounting in all to three

thousand five hundred dollars, being the purchase-money of the lots, and becoming due in one, two, three, and four years from their date, and dated, respectively, August 1, 1860.

Answers were put in by the defendants, replications filed, and proofs taken, and on the hearing the bill was dismissed for want of equity.

To reverse this decree, complainant brings the record here by appeal.

It appears from the mortgage, bearing even date with the notes, that it contains a power of sale, to be exercised by the mortgagee, his heirs or assigns, in case of default in the payment of any of the notes, or of the interest. Notice of the sale was required to be made in a newspaper published in Chicago ten days before the sale, and the mortgagee was empowered to make and deliver a deed to the purchaser thereof. It also appears the mortgage was made subject to another mortgage of one thousand dollars then on the premises, although not mentioned in the mortgage.

The notes were sold and delivered by Lubukee to the firm of Eisendrath & Co., and the mortgage assigned to them, the firm being then composed of Nathan Eisendrath and Godfrey Snyderacker, Moses Snyderacker not becoming a member of it until some months after the sale.

The first note, and the interest on the other notes, became due on the first day of August, 1861, and were not paid. At the request of Fuller, one of the makers of the notes, and one of the mortgagors, and a partner of complainant, the premises were advertised for sale in the name of Lubukee, in the mode required by the mortgage, and were sold to Moses Snyderacker by Lubukee for two thousand five hundred dollars, and subject to a former mortgage to one Swift of one thousand dollars, which, with the interest due upon it, then amounted to eleven hundred dollars. At the same time the notes of complainant and Fuller given for the property were canceled by Eisendrath, by burning them in presence of Fuller, one of the makers.

The real value of the property when sold would appear, from the testimony, to have been about five thousand dollars.

The other defendants, nineteen in number, are purchasers of the premises, in separate parcels, of Snyderacker, and have expended near thirty thousand dollars in valuable improvements upon them. The lots, without the improvements, were estimated, at the time the bill was filed (April term, 1867), at about eighteen thousand dollars. It further appears that

Moses Snyderacker had divested himself of all interest in the premises before the bill was filed to Eisendrath, in 1861, and to Hamlin and the others subsequently, and for a valuable consideration, and that they purchased without notice of any defects or irregularities in the sale or proceedings under the mortgage before or since the sale.

The first point made by appellant is, that the advertisement or notice of the sale described a different and other or larger indebtedness than that described in or secured by the mortgage, to wit, an indebtedness of one thousand dollars over and above the amount really due by the mortgage.

Admit the fact to be so, it is not shown that the property was injuriously affected by it, or bidders deterred thereby from attending the sale, nor is it shown it was so published for a fraudulent purpose; and if it was, there is no evidence the defendants, or any one of them, participated in it, or had any knowledge of it.

The next point is, that Lubukee had nothing to do with the sale, and knew nothing about it, and that Moses Snyderacker fraudulently obtained from him the deed for the property, of the contents of which Lubukee was ignorant.

It appears that Lubukee, the mortgagee, was a man whose memory had become impaired by a fall, and on his examination as a witness, did not recollect distinctly the circumstances attending the sale and the execution of the deed; but the papers evidencing it, signed with his name, were substantiated by him, he acknowledging his signature as his own handwriting. The sale was advertised in the name of Lubukee, and the deed to the purchaser made and signed by him, and delivered to the purchaser. And here appellant makes another point, — that Lubukee had assigned the notes, and the mortgage, being an incident only, went with the notes to the assignee, and consequently the power to sell went also to the assignee, and he should have sold.

What are the facts on this point? The notes were never assigned to any one. They were sold and delivered to Eisendrath & Co., and the mortgage assigned by an indorsement upon it. What, then, was the condition of the parties? The mortgage, not being an assignable instrument by indorsement, either by the common law or under the statute, the power to sell remained with the mortgagee: *Olds v. Cummings*, 31 Ill. 188; and in *Pardee v. Lindley*, 31 Id. 174 [83 Am. Dec. 219], this court said, where the mortgage gives to the mortgagee or his

assigns power to sell upon default in payment, an assignment of the note secured by the mortgage will vest the power of sale in the assignee; such power thereby passes from the mortgagee, and cannot be executed by him. In this case, the notes were not assigned by the mortgagee, consequently the power to sell remained with him, and he has executed it in conformity with the deed.

Appellant insists that at the time of the sale of the property the defendants — the two Snydaekers and Eisendrath — were interested, as partners, in these notes, and in the sale of the property and its avails, and remained so interested, and distributed the spoils among themselves.

The proof shows a contrary state of facts, — that Moses Snydacker had no connection with the firm of Eisendrath & Co. until some months after the sale; and as against Eisendrath, we could not say the sale should be now set aside as against him. Lubukee, as mortgagee, had the right to make the sale; and even if Eisendrath had an interest in the purchase by Moses Snydacker, yet in the absence of any evidence that Lubukee was interested in the purchase, and acting collusively, it is by no means apparent why the sale should be set aside. It is not a case of a trustee buying at his own sale. We perceive no evidence of collusion between Lubukee and any of these parties, and nothing in the proof to charge either of them with any fraud, violation of trust, collusion, or other act which a court of equity should condemn.

As to the other defendants, they are innocent purchasers for a valuable consideration, without notice of any equities which might have existed in favor of appellant against the original purchaser at the sale. Such purchaser is chargeable with notice of defects and irregularities attending the sale, and cannot evade their effect. With remote purchasers, such as Hamlin and the others named, the rule is different: *Cassell v. Ross*, 33 Ill. 244 [85 Am. Dec. 270]; *Reese v. Allen*, 5 Gilm. 236.

Appellant contends that these defendants, Hamlin and the others in the same category with him, are bound by the record notice shown by the public records of deeds and mortgages of Cook County, and that by them they knew the irregularity of the sale, the falsity of the advertisement, the inadequacy of the price bid at the sale, and all the other irregularities, — not only such as were patent upon the records, but of all such as they might have obtained knowledge upon inquiry.

It is certainly true the record of the mortgage was notice to

them, and that informed them only of the facts stated in it. It gave them no information of the kind of notice published for the sale of the mortgaged premises, nor of any irregularities which might have been committed in it, nor that the price paid was inadequate. All those were matters *in pais*, and must be brought home to their knowledge on a proper case made, sustained by proof. These defendants deny all knowledge of any equities existing in appellant, and he has failed to show knowledge. If there was fraud in the mortgagee in selling under the notice he gave, and they not participating in it or knowing of it, it would not be in harmony with the principles of law or equity to declare void the conveyances to them because of the fraud of their vendor. This would be equally illegal and unjust: *Prevo v. Walters*, 4 Scam. 35. Even if the mortgagee himself had been the purchaser at the sale, through the aid of a third party to whom he could have conveyed, and then taken the title from him, such title would not be absolutely void, but voidable only; and if immediate steps should not be taken by the *cestui que trust*, the mortgagor, on his obtaining a knowledge of the sale, to set it aside, a ratification by him would be implied. Such a sale can be set aside only at the option of the *cestui que trust*, and that must be determined in apt time. He has an election to treat the sale as valid, if he will: *Scott v. Freeland*, 7 Smedes & M. 409 [45 Am. Dec. 310].

Upon this point, the record shows that when the note became due, and when the sale was made, appellant was in Chicago, and in partnership with W. M. Fuller, his co-mortgagor, and that appellant remained there until February, 1862, when he went to the front with the regiment to which he belonged; that in April, 1862, he returned again to the city, and left the army in 1863, returned to Chicago, where he has ever since remained. He admits in his testimony that, in 1863, Eisendrath informed him of the sale of the property, and there is proof that he was informed of the sale at the time it took place. The bill was filed at the April term, 1867, and the delay unaccounted for. Four years elapsed after he had knowledge of the sale and proceedings under it, and he remained inactive, giving evidence thereby of acquiescence, and encouragement to purchasers. Valuable buildings have been erected upon the lots, and the region where they are situate, unpeopled when appellant purchased, now teems with a busy population, increasing thereby their value fivefold.

We know of no principle of law or equity which should disturb these purchasers in their titles and possession, nor can we see any equity whatever in appellant's case, as he has presented it.

We concur with the circuit court in the decree dismissing the bill.

Decree affirmed.

NOTICE OF SALE UNDER POWER contained in mortgage, what sufficient: *Hoffman v. Anthony*, 75 Am. Dec. 701, and note 704-713.

ASSIGNMENT OF NOTE SECURED BY MORTGAGE transfers power of sale contained therein: *Pardee v. Lindley*, 83 Am. Dec. 219, and note 224.

PURCHASER OF PROPERTY UNDER SALE PURSUANT TO POWER is chargeable with notice of the extent of the power, and is bound to see that it has been pursued: *Sears v. Livermore*, 85 Am. Dec. 564, and note 568.

IRREGULARITIES ATTENDING SALE UNDER POWER CONTAINED in mortgage do not render the sale absolutely void, but voidable only, and the mortgagor, having knowledge of them, may elect to abide by the sale, or disaffirm it, as he pleases. But having the right of election, he must exercise it within a reasonable time, and before innocent third parties have invested money and labor upon the faith of its validity; and if he does not do so, he will be barred from setting it aside: *Jenkins v. Pierce*, 98 Ill. 653; *Munn v. Burges*, 70 Id. 611-618; *Bush v. Sherman*, 80 Id. 175; *Sloan v. Graham*, 85 Id. 29, 30; *Jackson v. Spink*, 59 Id. 409; *Hoyt v. Pawtucket Inst. for Savings*, 110 Id. 399; *Breit v. Yeaton*, 101 Id. 272; all citing the principal case.

SALE UNDER POWER CONTAINED IN TRUST DEED, not made by the trustee, but by his agent or attorney, he not being present, is invalid as between the immediate parties, and will be set aside in equity: *Grover v. Hale*, 107 Ill. 642, citing the principal case.

INNOCENT PURCHASERS AT SALE UNDER POWER contained in trust deed, whose deed recites a compliance with all requirements of the statute, need not go behind it to ascertain if the recitals are true. They are not chargeable with notice of irregularities attending the sale: *Wilson v. South Park Commissioners*, 70 Ill. 50. The same rule applies to remote purchasers at a sale under a power contained in a mortgage: *Johnson v. Watson*, 87 Id. 539; *Munn v. Burges*, 70 Id. 615; *Farrar v. Payne*, 73 Id. 86; *Gunnell v. Cockerill*, 84 Id. 324. But the immediate purchaser is chargeable with notice of all irregularities attending the sale: Id.; all citing the principal case.

WHERE MORTGAGE CONTAINING POWER OF SALE is assigned by indorsement thereon, without assignment of the note, the power of sale does not pass to the assignee, but remains with the mortgagee: *Cushman v. Stone*, 69 Ill. 519. The equitable assignee of the indebtedness cannot execute the power in his own name, for he has neither the legal title to the estate mortgaged, nor to the indebtedness: *Warnecks v. Lembea*, 71 Id. 95; *Mason v. Ainsworth*, 58 Id. 167.

WHERE NOTICE OR ADVERTISEMENT OF SALE under power contained in mortgage states a different or other or larger indebtedness than that named in the mortgage, the sale is still valid, when it is not proved that the property was injuriously affected by it, or bidders thereby deterred from attending the sale, or that it was published for a fraudulent purpose, or if it was,

that defendant participated in or had knowledge of it: *Fairman v. Peck*, 87 Ill. 160, citing the principal case.

POWER OF SALE CONFERRED BY DEED OF TRUST or mortgage will be strictly construed and pursued, the presumption being that the delegation of power is induced by trust and confidence in the trustee authorized to make the sale. Such power, unless authorized by the instrument itself, cannot be delegated: *Flower v. Elwood*, 66 Ill. 449, citing the principal case.

RIGHT OF MORTGAGOR OR HIS GRANTEE TO REDEMPTION after condition broken is a purely equitable right, and when its assertion would be plainly inequitable, aid will be withheld. So where a defective foreclosure has been had, an equity of redemption cannot be asserted against a stronger equity: *Mulvey v. Gibbons*, 87 Ill. 383, citing the principal case.

LEONARD v. DUNTON.

[51 ILLINOIS, 482.]

WAREHOUSEMAN'S RECEIPT IS CONTRACT OF PARTIES as to the property stored, and parol evidence is inadmissible to change or vary its terms.

ASSUMPSIT WILL LIE AGAINST WAREHOUSEMAN for damages for breach of his contract to deliver, on demand, wheat stored with him; and though trover might also lie, the rule that a party cannot waive the tort and sue in *assumpsit* for money had and received, unless money has actually been received, has no application to such a case.

MEASURE OF DAMAGES AGAINST WAREHOUSEMAN sued in *assumpsit* for breach of his contract, in failing to deliver on demand wheat stored with him, is the value of the wheat at the time it should have been delivered.

WHERE WAREHOUSEMAN RECEIVES WHEAT AND STORES IT, agreeing to keep it for a short time without charge, and deliver it on demand, and is afterwards sued in *assumpsit* for damages in failing to deliver, the action is not defeated by a neglect or refusal to pay storage after the demand to deliver is made. In such case, the warehouseman is entitled to storage only after notice that it would be charged is given.

THE opinion states the facts.

Wood and Moore, for the appellant.

Burgess and Waterman, for the appellees.

By Court, BRESEE, C. J. This was an action of *assumpsit*, in the Boone circuit court, brought by William S. and George B. Dunton, for the use of William Waterman, against Marcellus G. Leonard, on a warehouse receipt for wheat delivered the defendant, a warehouseman, by the plaintiffs, on the 18th of May, 1861, and subject to their order.

The general issue was pleaded, and the jury found for the plaintiff, on which the court rendered a judgment. To reverse this judgment, defendant appeals.

The substantial question in the case, as appellant insists, is,

Was he bound to deliver the wheat without a tender or offer to pay the charges of storage?

The receipt in question, when executed by defendant, contained the words "on payment of charges," following immediately after the words "subject to the order of themselves, thereon," but which, on being presented to plaintiffs, they refused to accept, insisting the contract was the storage should be without charge, whereupon the defendant erased the words "on payment of charges," and in that form delivered it to the plaintiffs, and they accepted it.

This receipt must be held as the contract of the parties as to this wheat, and parol evidence to change its terms is inadmissible. The claim of appellant, therefore, that it was understood and agreed that the wheat should be free of charge for a short time only, cannot be allowed. Testimony to that point went to the jury, but their verdict ignores any such agreement or understanding.

The first point made by appellant is, that the receipt was improperly admitted in evidence against his objection. He contends it could only be material in connection with other evidence in an action of trover, and that under the evidence in this case *assumpsit* cannot be maintained. He insists, as the receipt on its face imports a bailment, the title to the wheat did not pass to him, but remained in appellees, and cites several cases in support of the proposition, among them *Seymour v. Brown*, 19 Johns. 44, where wheat had been delivered to a miller, to be converted into flour. It was consumed with fire, without negligence on the part of the miller, and he was held not liable. The case of *Burton v. Curyea*, 40 Ill. 321 [89 Am. Dec. 350], is also cited. That was pork in barrels, and it was held it was the property of the holder of the warehouse receipt.

The point that appellant makes is, that this wheat was mixed in the bin with wheat of the same quality belonging to him, and therefore appellees became tenants in common with him in the wheat, and he had a right to take his share from the bin, provided he left sufficient of the proper quality to meet the receipt held by appellees, and that if appellant refused to deliver appellees their share on demand, even if he had no lien on it for storage, it would present a clear case of conversion, for which an action of trover, and not *assumpsit*, would lie.

In support of this, *O'Reer v. Strong*, 13 Ill. 688, is cited.

This action was brought for the value of a bolting-cloth, alleged to have been sold with the mill. The court say, if the bolting-cloth was included in the sale, it might well be doubted whether he could recover in this form of action without proof, either that the defendant had converted the article into money or its equivalent, or had refused to deliver it according to the contract. In the first case, he might be entitled to recover the price, as so much money had and received by the defendant to his use; in the other, his damages for not delivering the property at the time it should have been delivered; and this is the rule everywhere.

This action is brought on the contract for failing to deliver the wheat on demand, according to the contract, and though trover might lie, *assumpsit* will also lie for damages for breach of contract. The rule that a party cannot waive the tort and declare in *assumpsit* for money had and received, unless money has actually been received, has no application to this case, and if it had, the action could be maintained on the proof that it was understood by the parties the wheat was to be sold by the defendant if he wished to sell it, and it is in proof he shipped it to market and sold it. The price of such wheat was proved, and it is a fair presumption he received the market price. This action was brought on the contract, and the measure of damages was the value of the wheat at the time it should have been delivered.

We come now to consider the second instruction asked by appellant, and on which his counsel say the case turns. That instruction was as follows:—

“If the jury further believe from the evidence that by agreement the grain in question was to be stored by the defendant for only a short time, without charge, and that the plaintiffs never demanded the grain until August, A. D. 1862, and then neglected and refused to pay reasonable storage after such time, and have not, before suit brought, offered to pay such reasonable storage after the lapse of such short time, then the jury should find for the defendant.”

The objection to this instruction is, that if the facts were as stated, it by no means followed the verdict should be for the defendant. The most he could claim would be a reasonable deduction for storage after the notice was given, or the appellant had sold the wheat. The instruction should also have contained some reference to notice by appellant to appellees, that after a certain day he should charge for storage, so that

appellees might withdraw the grain. This instruction was properly refused.

Some objections have been taken to the instructions given for the appellees. If they are obnoxious to objection, they did not tend so to mislead the jury as to work injustice. On consideration of the whole record, justice appears to have been done, and we will not disturb the judgment. It must be affirmed.

Judgment affirmed.

RIGHT OF OWNER OF GRAIN STORED IN WAREHOUSE to recover damages for breach of contract, as shown by warehouseman's receipt: *Dole v. Olmstead*, 85 Am. Dec. 397, and note 401. The measure of damages against the warehouseman for failing to deliver the article stored according to his contract, is its market value when it should have been delivered: *Chicago & N. W. R'y Co. v. Dickinson*, 74 Ill. 253, citing the principal case.

MAGEE v. MAGEE.

[51 ILLINOIS, 500.]

PURCHASE-MONEY ADVANCED BY THIRD PERSON WHEN LIEN ON HOMESTEAD. — Where a party advances the purchase-money for a homestead occupied by the vendee, upon his promise to execute a mortgage to secure the repayment of such money when he obtains a deed, and he afterwards refuses to do so, the purchase-money so advanced becomes a lien against the homestead, and may be enforced by the person advancing the money, and against it the vendee cannot maintain a homestead right.

OBJECTION THAT EQUITY HAS NO JURISDICTION, because there is an adequate remedy at law, comes too late after answer filed, unless it is in a case where equity could not entertain jurisdiction under any circumstances.

THE opinion states the facts.

Clark, for the plaintiff in error.

Ingersoll and Puterbaugh, for the defendant in error.

By Court, WALKER, J. It appears that some time in the year 1862, plaintiff in error entered into a contract with one Pairo for the purchasing of a forty-acre tract of land, agreeing to pay therefor the sum of four hundred dollars, and for which he executed his promissory notes, payable in one, two, and three years, with seven per cent interest per annum, and received a bond for a deed. In the month of October, 1866, plaintiff in error, being wholly unable to pay the amount due on the purchase-money, applied to defendant in error, and re-

quested him to make the payments, and proposed to give him a mortgage on the land as soon as he received a deed, to secure its repayment. Defendant in error acceded to the proposition. The parties thereupon went to Peoria and saw Bourland, the agent of Pairo, and defendant paid \$244 in money, and became surety for plaintiff in and for the sum of \$100 more, on the purchase-money, which he subsequently paid.

Plaintiff in error then agreed to pay the money to defendant in error in the following March, and to execute a mortgage on the premises to secure its payment immediately on their return home; and on their arrival there, in pursuance to the agreement, they went to a justice of the peace to have it executed, but he having no blanks, it was deferred, it being then agreed that it should be executed another time. It was, however, neglected, and defendant in error subsequently demanded the mortgage, when plaintiff in error refused, and alleged that he owed defendant in error nothing. It appears that defendant in error paid on the purchase of the land \$346.50, no portion of which ever passed into the hands of plaintiff in error, but it was paid directly to the agent of Pairo, on the contract.

It appears that at the time the money was advanced by defendant in error, plaintiff in error resided upon the land. The bill was filed in the court below, by defendant in error, to enforce his lien on the land, and on a hearing, the court below decreed the relief prayed; and this writ of error is prosecuted to reverse that decree.

It is urged as a ground of reversal that, inasmuch as the premises in controversy were the homestead of plaintiff in error when the money was paid, it could not become a lien on the land; that the money thus advanced by defendant in error was not and did not become a part of the purchase-money for the premises. The second section of the homestead act excepts debts and liabilities for the purchase or improvement of the homestead from the operation of the law, and leaves it liable to sale for such debts in the same manner as other real estate. The only question, then, which this record presents is, whether the money advanced by defendant in error was purchase-money.

In the case of *Austin v. Underwood*, 87 Ill. 438 [87 Am. Dec. 254], it was held that when a party owning and residing upon a homestead purchases and receives a conveyance of an adjoining tract, to be used in connection with and as a part of the homestead, and procures the purchase-money for the

adjoining tract, to be paid by a third person, as a loan to the purchaser, the money thus loaned will be regarded as purchase-money of the land, as against the claim of the homestead by the purchaser for whom it was paid. And in that case the distinction was taken between such a case and where money was loaned to pay a pre-existing debt, created for the purchase of the homestead.

The rule announced in that case must control this. Here, as there, the money was paid for the land, and was not a payment of a pre-existing debt. Had plaintiff only borrowed the money of defendant in error, and then paid his notes, the cases referred to by plaintiff in error in his brief might have controlled. In the case at bar, the defendant in error paid the money directly to the owner of the land to procure its conveyance. Had defendant in error paid the notes and taken an assignment, independent of any arrangement with plaintiff in error, no one would have doubted that he could have enforced the payment by subjecting the land to its payment, regardless of the homestead law, because it was a debt created for the purchase of the homestead. In such a case, defendant in error would have succeeded to all the rights of Pairo, and no person would insist that the homestead exemption could have been interposed against him. And, in principle, how does the case differ when plaintiff in error agrees that defendant in error shall have the same rights if he will pay the purchase-money? In equity and conscience the claim of defendant in error cannot be impaired by the solemn promise that defendant in error should have a lien on the premises to secure the money thus advanced. In this case plaintiff in error at no time had the money in his possession or control, but it was paid directly to Pairo's agent by defendant in error.

The case of *Eyster v. Hatheway*, 50 Ill. 521 [*ante*, p. 537], was a simple loan of money, which, after it was obtained, was applied to pay a portion of the purchase-money due on the homestead, and in that it differs from the case at bar. And an examination of the other cases referred to by plaintiff in error will show that the same distinction exists. We are of the opinion that the debt due the defendant in error was for the purchase of the homestead, and that it is not exempt from sale for its payment.

It is insisted that a court of equity has no jurisdiction of the case, because there was a remedy at law that would afford adequate relief. In the case of *Stuart v. Cook*, 41 Ill. 447, it

was held that the objection as to the want of jurisdiction comes too late after an answer is filed, unless it be in a class of cases where a court of equity could under no circumstances entertain jurisdiction. The rule there announced applies to and governs this case. The objection should have been interposed before the answer was filed, and comes too late on error. This bill is for the enforcement of a lien on the land, and courts of equity entertain jurisdiction for their enforcement in all cases where they cannot be rendered effective in a court of law. And although the remedy may have been complete at law, the objection was not raised in apt time.

An examination of the evidence fails to satisfy us that the decree is unwarranted. It is true it is not clear and conclusive on every point, but when fully considered we think it sustains the decree of the court below, and it must be affirmed.

Decree affirmed.

VENDOR'S LIEN ON HOMESTEAD FOR PURCHASE-MONEY—WHO ENTITLED TO.—In nearly all of the states, statutory or constitutional provisions declare that the homestead exemption shall not extend so far as to exclude the sale of the property claimed as exempt to satisfy the lien existing against it for unpaid purchase-money. Therefore no homestead right can be acquired in land upon which the purchase-money is due and unpaid, as against the lien of the vendor. It may be impressed with the homestead character, but remains subordinate to such lien, whether created by mortgage or otherwise, until removed in a lawful manner. In other words, until the purchase-money is paid, the vendee has not such estate in the land as will support the homestead right, as against the party to whom such money is due. To this effect the authorities are numerous and uniform: *Hopper v. Parkinson*, 5 Nev. 233; *Farmer v. Simpson*, 6 Tex. 303; *Shepherd v. White*, 11 Id. 354; *Stone v. Darnell*, 20 Id. 14; *Robertson's Adm'r v. Paul*, 16 Id. 472; *Barnes v. Gay*, 7 Iowa, 26; *Christy v. Dyer*, 14 Id. 438; S. C., 81 Am. Dec. 493; *Cole v. Gill*, 14 Iowa, 527; *Burnap v. Cook*, 16 Id. 149; S. C., 85 Am. Dec. 507; *Skinner v. Beatty*, 16 Cal. 156; *McHendry v. Reilly*, 13 Id. 75; *Williams v. Young*, 17 Id. 403; *Tunstall v. Jones*, 25 Ark. 272; *Buckingham v. Nelson*, 42 Miss. 417; *Baker v. Ramey*, 27 Tex. 52; *Berry v. Boygess*, 62 Id. 239; *Hicks v. Morris*, 57 Id. 658; *Bush v. Scott*, 76 Ill. 524. As is said in *Nichols v. Overacker*, 16 Kan. 59, the spirit of the homestead law is, that no man shall enjoy property as a homestead, or an improvement thereon, as against the just claim of the person who procured it for him. This is highly equitable and just. "Indeed, there is no homestead exemption law as against purchase-money. As to it the homestead is just like any other real estate, and governed by the same rule as other real estate. A homestead may be sold on execution for the purchase-money": *Greene v. Barnard*, 18 Id. 521.

The following cases show more specifically that a mortgage to secure the payment of the purchase-money for the homestead entitles the mortgagee to a lien against the land until such money is paid. In *Curtis v. Root*, 20 Ill. 57, the court say "that a mortgage given for the purchase-money of land, and executed at the same time the deed is executed to the mortgagor, takes

precedence of a judgment against the mortgagor. The execution of the deed and mortgage being simultaneous acts, the title to the land does not for a single moment rest in the purchaser, but merely passes through his hands and vests in the mortgagee, without stopping at all in the purchaser, and during such instantaneous passage, the judgment lien cannot attach to the title. This is the reason assigned by the books why the mortgage takes precedence of the judgment rather than any supposed equity which the vendor might be supposed to have for the purchase-money, though that consideration may have originated the rule at first." See also to the same effect, *New England Jewelry Company v. Merriam*, 2 Allen, 390; *Calhoun v. Calhoun*, 2 S. C. 283; *Dillon v. Bryne*, 5 Cal. 455; *Skinner v. Beatty*, 16 Id. 156; *Montgomery v. Tutt*, 11 Id. 190; *Austin v. Underwood*, 37 Ill. 438; S. C., 87 Am. Dec. 254; and the same rule prevails, though the wife did not join in the mortgage: *Lassen v. Vance*, 8 Cal. 271. Where the purchaser, at the time he receives his deed, borrows money which he applies in part payment therefor, and afterwards, on the same day, executes a note for the borrowed money, the note is regarded as relating back to the time of the actual loan, as an existing debt and lien at the time of the purchase: *Stevens v. Stevens*, 87 Am. Dec. 630. The mortgagor, by redeeming from foreclosure sale for part of the purchase price, cannot hold the land free from the lien for the part not satisfied: *Campbell v. Maginnis*, 70 Iowa, 589.

Assignment of Lien. — The greater portion of the authorities agree that the assignee of a note given for the purchase-money of a homestead is subrogated to the rights of the vendor, as against the right of homestead exemption in the vendee: *Kelly v. Stephens*, 39 Ga. 466; *Lane v. Collier*, 46 Id. 580; *Wofford v. Gaines*, 53 Id. 485; *Sparger v. Cumpston*, 54 Id. 355; *Dillon v. Bryne*, 5 Cal. 455; *Birrell v. Schie*, 9 Id. 104; *Wynn v. Flannegan*, 25 Tex. 778.

Though a contrary doctrine is intimated in *Malone v. Kaufman*, 38 Tex. 454, still the subsequent Texas cases are uniform in sustaining the principle first stated; for in *Hicks v. Morris*, 55 Id. 658, it is said that the declaration on the face of the note, that it is given for the purchase-money of the homestead, subrogates the holder, when the money is applied in paying off the lien, to the rights of the original vendor. And again it is said, in *Flanagan v. Cushman*, 48 Id. 244, that it must be regarded as settled that the transfer or assignment of the debt due for the purchase-money of the homestead carries the lien or security for its payment, unless it is shown that such was not the intention of the parties. See also, to the same effect, *Ellis v. Singletary*, 45 Id. 27; *Irvin v. Garner*, 50 Id. 49. In a late case, where the purchaser of the homestead gave his note, specifying that it was given for the purchase price, and the payee assigned it to another, who surrendered it to the maker, and took a new note as a substitute for the first, it was held that, as the last note was given for the purchase price, the maker could not enforce the homestead exemption against it: *Murray v. Davis*, 5 S. W. Rep. 569 (Ky.). See *Farmer v. Wood*, 72 Ga. 16, which seems to maintain the contrary doctrine.

Purchase-money Advanced by Third Party. — Whether money loaned by a third person to the vendee to enable him to purchase a homestead, or to complete the payment for one already purchased, entitles him to the vendor's lien, is a question upon which there is great conflict of opinion. In the following cases it is held that the party advancing the purchase-money is thereby entitled to the privilege possessed by the vendor, and is a lienholder against the homestead: *Nichols v. Overacker*, 16 Kan. 54; *Pratt v. Topeka Bank*, 12 Id. 570; *Greeno v. Barnard*, 18 Id. 521; *Austin v. Under-*

wood, 87 Am. Dec. 254; *Stevens v. Stevens*, 87 Id. 639; *Carr v. Caldwell*, 70 Id. 740, a very strong and equitable case sustaining the above rule; see also *Allen v. Hawley*, 66 Ill. 164; *Stube v. Lucas*, 36 Id. 462; *Kelly v. Stephens*, 39 Ga. 466; *Lassen v. Vance*, 8 Cal. 271; *Pinckney v. Cellard*, 13 Tex. 333; *Beal v. Harrington*, 116 Ill. 113-122; *Weider v. Clark*, 27 Id. 251; *Hawrick v. People's Bank*, 54 Ga. 502; *Hawks v. Warren*, 46 Id. 204; *Carey v. Boyle*, 53 Wis. 574; at page 581 a rule is evolved which is perhaps the true solution of the problem, and the way out of the difficulty arising from the conflict of authority and the distinction made in many of the cases. The court say that "it must be understood that the extension of this equity [the vendor's lien] to a third person is strictly confined to those who furnish or advance the purchase-money to the purchaser in such manner that they can be said either to have paid it to the vendor personally, or caused it to be paid on behalf or for the benefit of the purchaser, and to this extent they become parties to the transaction. It must not be a general loan, to be used by the purchaser to pay the consideration of the purchase, or to be used for any other purpose, at his pleasure. In such case, the simple fact that the money can be traced into the land as having been paid by the purchaser to the vendor, as the whole or part of the purchase-money, gives the person who loaned it no such right."

In full accord with this view is *Nichols v. Overacker*, 16 Kan. 54. On the other hand, authority is not wanting to sustain what appears to be the inequitable rule, that the person who furnishes the money to the vendee to enable him to pay the vendor for the homestead does not stand in the position of the vendor, so as to be entitled to his lien for the money advanced: *Stansell v. Roberts*, 13 Ohio, 148; *Skaggs v. Nelson*, 25 Miss. 88; *Chapman v. Abrahams*, 61 Ala. 108; *Tyler v. Jewett*, 2 South. Rep. 906 (Ala.); *Burnap v. Cook*, 85 Am. Dec. 507. In *Notte's Appeal*, 45 Pa. St. 363, it is said that the party so advancing the money is manifestly a loan creditor, and nothing more; there is no privity between him and the vendor, and he is not entitled to his lien. And the same ruling was adhered to in *Lear v. Hefner*, 28 La. Ann. 829; and in *Malone v. Kaufman*, 38 Tex. 454, even though it appeared in this case that it was the intention of the vendee that the party advancing the money should be subrogated to the lien of the vendor. In *Eyster v. Hatheway*, 50 Ill. 525, it is said that such purchase-money means the price agreed to be paid for the land to the vendor, and not a debt due another party; therefore, where money is borrowed from a third person, and applied by the borrower to the payment of the purchase-money due for the homestead, the third party does not stand in the place of the vendor, and is not entitled to his lien.

THE PRINCIPAL CASE IS CITED with approval, as to the last point in the syllabus, *supra*, in *Chicago Theological Seminary v. Gage*, 103 Ill. 182.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
INDIANA.

SIMPSON v. PEARSON.

[81 INDIANA, 1.]

APPEAL MAY BE TAKEN, IN INDIANA, FROM INTERLOCUTORY ORDER DIRECTING DELIVERY OF POSSESSION OF REAL PROPERTY, OR SALE THEREOF, if taken at the same term of the court at which the order was made; or if the order is made in vacation, the appeal may be taken either at the time the order is made, or during the next term.

DEED TO HUSBAND AND WIFE DOES NOT INVEST THEM WITH SEPARATE MOETIES OF LAND SO CONVEYED; but each thereby becomes seised of it as an entirety, with the right of survivorship, and the husband at his death would leave no estate which could be subjected to the payment of his debts, or which would descend to his heirs. Husband and wife are considered one person in law.

ESTOPPEL MAY BE BY DEED, BY RECORD, OR BY MATTER IN PARS. The acts and admissions of a party may estop him from even speaking the truth, when in good conscience and honest dealing he ought not to be permitted to gainsay them.

ESTOPPEL IN PARS WILL CONCLUDE PARTY FROM DENYING HIS OWN ACTS OR ADMISSIONS, which were expressly designed to influence, and which did influence, the conduct of another, when such denial will operate to the injury of the latter. The principle underlying this doctrine is, that it would be a fraud in a party to assert what his previous conduct and admissions have denied, when others have acted on the faith of that denial.

NO ONE CAN SET UP ANOTHER'S ACT OR DECLARATION AS GROUND OF ESTOPPEL, unless he himself has been misled or deceived by such act or declaration, and unless he would be injured, if that other is permitted to gainsay or deny the truth of what he did.

ESTOPPELS OPERATE NEITHER IN FAVOR OF NOR AGAINST STRANGER; hence he can neither be bound by nor take advantage of an estoppel. This principle applies to all classes of estoppels.

HEIRS ARE NOT ESTOPPED BY DECREE AND PROCEEDINGS, IN PARTITION SUIT BETWEEN THEMSELVES, from showing, in an action against them by the administrator of the person from whom they inherit, a title to land different from that shown in such partition suit.

PEARSON, administrator of the estate of Simpson, deceased, filed a petition, praying that certain lands be subjected to the payment of the debts of decedent, and that they be ordered sold for that purpose. The petition showed that the assets in his hands were insufficient for the payment of debts of decedent, etc., and alleged that, after decedent's death, his widow filed a petition in the circuit court, against his children, for the partition of the lands in controversy, claiming that she was seised in fee, in her own right, of one undivided half of said lands, and that her husband died seised in fee of the other moiety, one third of which descended to her as his widow, and the balance to his children. Such proceedings were had therein that the partition was made as shown and prayed for in said petition. The administrator claimed that the lands so partitioned to the children and widow, as heirs of said decedent, should be sold to pay debts of decedent. The widow answered separately, alleging that on and prior to February 29, 1856, she and decedent were husband and wife; that on that day one Miller executed and delivered to her and her said husband jointly a deed of conveyance in fee to the lands in controversy, and that her said husband never held any other title, claim, or interest in said lands than under said deed; and that he subsequently died, leaving her his widow surviving him. She claimed that all his right, interest, and estate in said lands ceased and were determined by his death; and that she, the surviving grantee in said deed, became and still was the exclusive owner in fee of the whole of said lands, and that no interest therein whatever descended to decedent's children; and that ever since the death of her said husband she had held the whole of said lands as and for her own. Miller's deed was made a part of said answer, and ran as follows: "In consideration of the sum of six thousand dollars to Barnabas Miller paid by Reuben Simpson and Martha C. Simpson, his wife, the said Barnabas Miller doth convey and warrant to said Reuben Simpson and Martha C. Simpson, their heirs and assigns, the following tracts of land," etc. The children filed a joint answer,—1. A general denial; 2. Substantially the same as the answer of their co-defendant, with the additional averment that if any interest in said lands had been divested

out of said Martha C. since the death of said Reuben, it had vested in them by virtue of the proceedings in said partition suit, and not by descent from said Robert. The court sustained a demurrer to the first part of Martha C.'s answer, and to the second part of the answer of the children. On final hearing, the court made an order for the sale of the lands in controversy to make assets for the payment of the debts of the decedent. From this order the defendants appealed, and filed an appeal bond, which was approved by the court.

J. and T. L. Collins, for the appellants.

J. H. Stotsenberg and T. M. Brown, for the appellee.

By Court, ELLIOTT, C. J. Before examining the questions raised by the assignment of errors, our attention is called to a preliminary one raised by the appellee. The appeal being from an interlocutory order, and not from a final judgment, it is urged that it is prematurely brought, and should be dismissed.

Section 550 of the code authorizes appeals to this court from the circuit and common pleas courts from all final judgments, with certain exceptions; and section 576 provides that "appeals to the supreme court may be taken from an interlocutory order of any court of common pleas, or circuit court, or judge thereof, in the following cases; . . . 2. For the delivery of possession of real property, or the sale thereof." Section 577 enacts that "such appeal may be taken at the term of the court at which the order is made; or when made in vacation, the appeal may be taken at the time, or during the next term; the appeal shall not be granted until the appellant has filed an appeal bond, as in other cases of appeal." Here the appeal was taken during the term at which the order was made, and a bond was filed under the order of the court; and we think the provisions of the code referred to clearly authorize the appeal. This ruling is not in conflict with *Staley v. Dorset*, 11 Ind. 367; *Love v. Mikals*, 12 Id. 439; or *Berry v. Berry*, 22 Id. 275; but is entirely consistent with them. In neither of those cases was a bond filed and the appeal prayed at the term at which the order of sale was made; and in each of them it is stated that the appeal was not prayed and perfected under sections 576 and 577 of the code.

The ruling of the court in sustaining the demurrers to the first paragraph of the answer of Martha C. Simpson, and to

the second paragraph of the answer of the other defendants, presents the only questions urged by the appellants for a reversal of the order of the court appealed from.

Husband and wife are considered one person in law, and hence the deed from Miller to Reuben Simpson and his wife, Martha C., did not invest them with separate moieties of the land conveyed, but each thereby became seised of it as an entirety, with the right of survivorship; and upon the death of Reuben Simpson, his widow, Martha C., by virtue of her right of survivorship, became seised of the whole estate to her sole use: *Davis v. Clark*, 26 Ind. 424. It follows that Reuben Simpson, at his death, left no estate in the land subject to the payment of his debts, or that descended to his heirs. That such is the legal effect of the deed is not controverted by the appellee; but it is insisted that the appellants are concluded or estopped by the proceedings in the suit for partition in the Lawrence circuit court from denying that Reuben Simpson died seised in fee of a moiety of the lands which were the subject of that suit; and that such moiety, upon his death, descended to his widow and heirs at law, and therefore that the court did right in sustaining the demurrers.

The acts and admissions of a party may estop him from even speaking the truth, when in good conscience and honest dealing he ought not to be permitted to gainsay them. An estoppel may be by deed, by record, or by matter *in pais*. As to the latter, a party will be concluded from denying his own acts or admissions, which were expressly designed to influence the conduct of another, and did so influence it, when such denial will operate to the injury of the latter: See *Ridgway v. Morrison*, 28 Ind. 201, and cases there cited. The principle underlying such estoppels is, that it would be a fraud in a party to assert what his previous conduct and admissions have denied, when on the faith of that denial others have acted.

But one who insists upon the acts of another as working an estoppel must show that he acted upon the same, and was influenced thereby to do some act which would result in an injury if that other is permitted to gainsay or deny the truth of what he did. For it is a well-settled rule in such cases, that no man can set up another's act or declaration as the ground of an estoppel, unless he has himself been misled or deceived by such act or declaration: 3 Washburn on Real Property, c. 2, secs. 6, 9, a.

It follows from the very principle on which the whole doctrine of estoppels rests, that they operate neither in favor of nor against strangers, but affect only the parties thereto and their privies, either in blood, in estate, or in law; and hence a stranger can neither take advantage of, nor be bound by, an estoppel. This principle applies equally to estoppels by deed, by record, and *in pais*. It is a well-settled rule that judgments of courts are binding only on parties thereto and their privies. An estoppel must be mutual; and hence a stranger to the record cannot claim an estoppel thereby, as he is not himself estopped by it.

Mr. Washburn, speaking of estoppels by deed, says: "It should be remembered that an estoppel by deed is always applied in some action or proceeding based on the deed, in which the fact in question is recited. In a collateral action there can be no estoppel, nor will estoppels by deed avail in favor of any but the parties and their privies": 3 Washburn on Real Property, c. 2, secs. 6, 11.

Applying these rules to the case at bar, it seems evident that neither Martha C. Simpson nor the heirs at law are estopped by the proceedings in the partition suit from denying, in this case, that Reuben Simpson died seised in fee of a moiety of the land described in the petition for partition, or from asserting the truth in reference to the title thereto. The administrator stands in the relation of trustee to the creditors of the decedent; but neither the administrator nor the creditors of the decedent were parties to the suit for partition, nor do they in any manner occupy the relation of privies to the parties to that suit, and are not therefore in a position to claim that the parties thereto are estopped thereby from showing that the decedent left no interest or estate in the lands subject to the payment of his debts.

We think, therefore, that the court below erred in sustaining the demurrers.

The judgment is reversed, with costs, and the cause remanded, with directions to the court of common pleas to overrule the demurrers to the first paragraph of the answer of Martha C. Simpson, and to the second paragraph of the answer of the other defendants, and for further proceedings not inconsistent with this opinion.

INTERLOCUTORY ORDERS ARE APPEALABLE: See *Pinchey v. Henegan*, 49 Am. Dec. 592; but an interlocutory judgment in partition is not appealable. See note to *Gudgell v. Mead*, 40 Id. 122.

DEED TO HUSBAND AND WIFE CONVEYS ESTATE BY ENTIRETIES, with incidents thereof: See *Hemingway v. Scales*, 97 Am. Dec. 425; *Luz v. Hoff*, 95 Id. 502; *Davis v. Clark*, 89 Id. 471, note 477; *Bennett v. Child*, 88 Id. 692, note 695.

ESTOPPELS, PRINCIPLES OF—ESTOPPELS IN PAIS: See *Johnson v. Frisbie*, 96 Am. Dec. 506; *Russell v. Maloney*, 94 Id. 358, note 363; note to *Brown v. Bowen*, 86 Id. 414; *Plummer v. Lord*, 85 Id. 773; *Beardsley v. Foot*, 84 Id. 405.

DECREE AND PROCEEDINGS IN PARTITION, CONCLUSIVENESS OF: See *Dresher v. Allentown Water Co.*, 91 Am. Dec. 150, note 152; note to *Godfrey v. Godfrey*, 79 Id. 453; collected cases in note to *Nash v. Church*, 78 Id. 693.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: Exclusive jurisdiction is conferred upon the court of common pleas to order the sale of real estate, and this carries with it jurisdiction to try the question of title, where the land is sold to pay debts: *Gavin v. Graydon*, 41 Ind. 562; *Lantz v. Maffett*, 102 Id. 30. An appeal from an order of sale must be made at the term at which the order of sale was made: *Baker v. Griffith*, 83 Id. 415. No man can set up another's act or declaration as the ground of an estoppel, unless he has himself been misled or deceived by such act or declaration: *Winship v. Winship*, 43 Id. 300. The principal case was cited to the second point of the syllabus, *supra*, in *McConnell v. Martin*, 52 Id. 436; *Edwards v. Beall*, 75 Id. 406; *Jones v. Chandler*, 40 Id. 592; *Chandler v. Cheney*, 37 Id. 413; *Carver v. Smith*, 90 Id. 224; see, generally, *Greenup v. Crooks*, 50 Id. 421.

ADAMS EXPRESS COMPANY v. DARNELL.

[81 INDIANA, 20.]

COMMON CARRIER IS LIABLE AS INSURER OF GOODS ENTRUSTED TO HIM FOR TRANSPORTATION.

GENERAL DENIAL, UNDER CODE PRACTICE, MERELY PUTS IN ISSUE such of the averments of the complaint as the plaintiff is bound to prove.

LIABILITY OF CARRIER, WHERE CONSIGNEE HAS NOTICE OF ARRIVAL OF GOODS, IS NOT THAT OF INSURER, after he has attempted to deliver the goods, but is prevented from performing that duty by the willful absence of the consignee from his place of business during business hours. He must, however, still exercise ordinary care in preserving the goods, and will be liable for their loss if he is negligent in this respect.

CARRIER'S DUTY TO DELIVER, AND CONSIGNEE'S DUTY TO RECEIVE, ARE RECIPROCAL. This doctrine must be maintained to prevent wrong.

ERRONEOUS INSTRUCTION AS TO REASONABLE TIME FOR RECEIVING GOODS.

—An instruction to the jury that if the consignee was at the place where the goods were to be delivered by the carrier on the day following their arrival, when he had notice of the time of arrival, it would be within a reasonable time for the purpose of receiving such goods, is erroneous, as it tells the jury plainly that those facts would not terminate the carrier's liability as an insurer.

THE facts are stated in the opinion.

T. A. Hendricks, O. B. Hord, and A. W. Hendricks, for the appellant.

M. M. Ray, J. W. Gordon, W. March, and B. F. Davis, for the appellee.

By Court, FRAZER, J. This was a suit against the appellant, as an express carrier, by the appellee, to recover the value of United States bonds to the amount of twenty-one thousand dollars, intrusted by the appellee to the express company, to be conveyed from Indianapolis to the village of Waldron, consigned to the appellee, and lost by the negligence of the appellant, and not delivered to the plaintiff.

There was an answer in five paragraphs, only two of which need be noticed.

1. General denial.

2. That the defendant kept an agent and office at Waldron, and plaintiff resided there; that Waldron was a small village to which valuable packages were seldom sent, the express business of the defendant at that point being so small as not to require or justify the defendant in keeping an iron safe, and none was therefore kept there by it,—of all which the plaintiff had notice; that when the package was delivered by the plaintiff to the defendant at Indianapolis, the former well knew that by due course of transmission it would arrive at Waldron at noon on the 11th of May, 1866, at which hour it did safely arrive, and was ready for delivery to the plaintiff; that the plaintiff was absent from home during all that day, and had no agent there, so that delivery to him in person could not be made on that day during business hours, though the defendant was then ready to make such delivery; that the defendant afterwards, on that day, deposited said package in a good and secure iron safe of one Haywood, reputed to be a respectable and responsible merchant of the village, and caused the safe to be securely locked, said safe being the most secure place of deposit in the village; that on that night the safe was robbed by burglars, and the bonds stolen, wherefore it became impossible to deliver.

It is assigned for error, that a demurrer was sustained to the second paragraph of the answer.

If the facts alleged in the second paragraph of the answer are true, and are sufficient to show proper care, then it is not true, as the complaint avers, that the bonds were lost by the defendant's negligence, and to that extent the general denial was equally effective.

The liability of a common carrier, however, is that of an

insurer. If the complaint be regarded as making a case against the defendant in that character, and if the facts averred in the second paragraph of the answer show that all the defendant's duties as carrier had been performed, and its liabilities as such ended, when the package was lost, and that the responsibility of the defendant was, at the time of the loss, merely that of bailee, or warehouseman, or anything less than that of carrier, then the paragraph confesses and avoids; it admits the receipt of the property as carrier and the failure to deliver, as alleged, which was all that the plaintiff need prove to make a case, but it attempts to avoid the consequent liability by showing a certain state of facts. Are these facts sufficient in avoidance? If they are, the paragraph was good; if not, it was bad.

The scope of the general denial under the code is merely to put in issue such of the averments of the complaint as the plaintiff is bound to prove in order to maintain his action; it does not controvert redundant allegations: *Baker v. Kistler*, 13 Ind. 63.

Personal delivery of the package was one of the duties of the carrier as such. The answer shows that this was rendered impossible by the plaintiff, in consequence of his absence, with a knowledge by him of the arrival of the package. Could he thus knowingly and on purpose prolong the extraordinary liability of the defendant as insurer, by putting it out of the power of the latter to terminate that liability? It was the interest of the carrier to terminate its liability as insurer as soon as possible, and it was its right and duty to do so within a reasonable time by delivery. Such was the nature of the contract. This right to terminate liability as insurer it was not in Darnell's power to take away by design, or to promote his convenience; for to do so would be to secure to himself an additional insurance not contracted for. If his interests, convenience, or pleasure required his absence, the consequences of such absence should fall upon himself, and not upon another. Such absence, preventing delivery, would not discharge the defendant from all responsibility, but it would end its liability as carrier; thenceforth its liability would be that of a bailee, not liable as insurer, but for such reasonable care of the property as prudence would require; and the paragraph of the answer under consideration certainly shows such care.

The doctrine that the carrier's duty to deliver, and the con-

signee's duty to receive, are reciprocal, and that each must be maintained, is approved by the plainest considerations of justice, and is necessary to prevent wrong and imposition. We are not aware that it has ever been questioned. It has, on the contrary, been recognized by many decisions, but in none that we are advised of has it been so plainly declared as in *Roth v. Buffalo etc. R. R. Co.*, 34 N. Y. 548 [90 Am. Dec. 736]; see also *Marshall v. American Express Co.*, 7 Wis. 1 [73 Am. Dec. 381]; *Richardson v. Goddard*, 23 How. 28.

It may not be possible always to fix the exact time when the carrier's responsibility as insurer ceases, and when he becomes a mere bailee in deposit, or otherwise. But where, as is alleged here, the consignee has notice of the arrival, and the carrier is ready to deliver, it seems to accord with reason as well as authority that then the liability as carrier ends: *Roth v. Buffalo etc. R. R. Co.*, 34 N. Y. 548 [90 Am. Dec. 736]; *Young v. Smith*, 3 Dana, 91 [28 Am. Dec. 57].

It is urged, however, that the appellant had, upon the trial, the full benefit of all the facts alleged in the second paragraph of the answer. But this is a mistake. Most of the facts alleged were in evidence, it is true, and properly so under other issues; but the court instructed the jury that "if the plaintiff to whom the package was consigned was at the place where the package was to be delivered the next day after its arrival, and ready to receive the same, it was within a reasonable time." This instruction would effectually deprive the appellant of the benefit of the facts. It told the jury very plainly that those facts did not relieve the carrier of responsibility as insurer. If the facts, as pleaded, were sufficient, then the instruction was obviously wrong.

A demurrer to the fourth paragraph of the reply was overruled, and this is assigned for error. This paragraph was addressed to the third paragraph of the answer, and is a good argumentative denial thereof, and therefore there was no error in overruling the demurrer to it. It contains other matters which have no application whatever to the defense to which it purports to be a reply, but seems to have been rather intended to apply to the second paragraph of the answer, to which, as we have seen, a demurrer had been sustained. It would have relieved the record of some confusion and redundancy if this paragraph of the reply had been stricken out. It did nobody any good, and has served to impair the pertinency of argument here.

Reversed and remanded, with directions to overrule the demurrer to the second paragraph of the answer, and to allow both parties to amend their pleadings.

GREGORY, J., dissents as to the sufficiency of the defense as stated in the second paragraph of the answer, and deems the sixth instruction correct.

COMMON CARRIER IS INSURER OF GOODS, TO WHAT EXTENT: See *Selma etc. R. R. Co. v. Butts*, 94 Am. Dec. 694; *Fillebrown v. Grand Trunk R'y Co.*, 92 Id. 606; *Southern Ea. Co. v. Purcell*, 92 Id. 53; *Southern Ea. Co. v. Newby*, 91 Id. 783; *Bansemmer v. Toledo etc. R'y Co.*, 87 Id. 367; *Read v. Spaulding*, 86 Id. 426, note 433; *Merritt v. Earle*, 86 Id. 292; *Hooper v. Wells, Fargo, & Co.*, 85 Id. 211.

ANSWER BY WAY OF DENIAL RAISES ISSUE ONLY ON FACTS ALLEGED IN COMPLAINT: See *Finley v. Quirk*, 86 Am. Dec. 93, note 100.

DUTY OF CARRIER, AND HIS LIABILITY, WHEN CONSIGNEE IS ABSENT ON ARRIVAL OF GOODS: *Bansemmer v. Toledo etc. R'y Co.*, 87 Am. Dec. 367; *American Ea. Co. v. Hockett*, 95 Id. 691. Carrier's liability continues until a reasonable opportunity has been afforded consignee to take his goods away: See *Blumenthal v. Brainerd*, 91 Id. 349, note 363. As to what is such opportunity, see same case. As to what is ordinary care, see cases cited in note to *Hayes v. Wells, Fargo, & Co.*, 83 Id. 96. As to the three positions held by courts on the question as to when a common carrier's liability as such ceases, and as to when his liability as a warehouseman commences, see *McMillan v. Michigan etc. R. R.*, 93 Id. 208; note to *Wood v. Crocker*, 86 Id. 776. The consignee has no power to prolong the carrier's liability, however inconvenient it may be for him to receive the goods: See case last cited.

CITATIONS OF PRINCIPAL CASE. — The liability of a common carrier in the shipment of lumber, coal, or the like, will terminate, in the absence of a contract providing otherwise, when the car containing the same is placed where such articles are usually unloaded, or when the car is delivered at some safe and convenient place designated by the consignee, and notice of such delivery has been given. And where the local agent of a railroad company carrying lumber recognizes the obligation of the company to run the cars to the usual place of delivery, and agrees so to do, but before the agreement has been carried out, the lumber is destroyed by fire, the company is not liable: *Pittsburgh etc. R'y Co. v. Nash*, 43 Ind. 425. Every fact which goes to defeat a cause of action, and which the plaintiff is not bound to prove in order to make out his case, must be alleged in the answer: *Pfaffenberger v. Platter*, 98 Id. 123, holding that evidence which does not controvert any fact which the plaintiff must prove is not admissible for the defense under the general denial.

KANTROWITZ v. PRATHER.

[21 INDIANA, 92.]

MARRIED WOMAN'S SEPARATE PROPERTY CANNOT BE BOUND UPON HER CONTRACT, unless her intent to deal with and bind the property clearly appears. Such intent cannot be assumed; it must appear that the contract is one from which benefit results to the property.

PROFITS OF MARRIED WOMAN'S SEPARATE PROPERTY MAY BE DISPOSED OF BY HER as if she were a *feme sole*.

TO ENFORCE MARRIED WOMAN'S CONTRACT IN EQUITY, IT MUST APPEAR that it is conscionable, for the betterment of her property rights, and reasonably calculated to promote that end.

CREDIT GIVEN TO MARRIED WOMAN ON FAITH OF HER SEPARATE PROPERTY IS NOT SUFFICIENT TO BIND IT, or its income. It must appear that she intended to create a charge against it, or its income.

THE facts are stated in the opinion.

S. Stansifer and F. Winter, for the appellants.

F. T. Hord and A. W. Prather, for the appellees.

By Court, RAY, J. Suit by the appellants against the appellees. The complaint is as follows: "The plaintiffs, Jacob Kantrowitz and Nathan Kantrowitz, partners, trading under the firm name and style of Kantrowitz & Co., complain of Hannah Prather, defendant herein, and say that said defendant is now, and has been continually for four years last past, the wife of her co-defendant, Allen W. Prather, who is also made party hereto; that said Hannah is now, and has been continually for the four years last past, seised in her own right and for her sole use and benefit, of lot No. 32, in Sims and Findley's addition to the city of Columbus, in said county, of the value of \$4,000; and that the said Hannah is indebted to plaintiffs in the sum of \$386.45 for necessary goods, wares, and merchandise sold and delivered by said plaintiffs, as said firm, to said defendant Hannah, at her special instance and request, a bill of particulars of which is filed herewith, and made part hereof. The said goods were sold and credit given to said Hannah on the faith of her said separate property, and not otherwise; the payment of which said indebtedness is a charge upon the separate property of said Hannah. Said indebtedness is due and unpaid. The articles furnished by plaintiffs to defendant were articles suitable to a person in her station in life; and the credit was given to her exclusively, her husband having no property subject to execution at or during the time the articles were being furnished. Wherefore plaintiffs pray the court for a finding of the amount due

from said wife to them, and a decree charging her said separate property with the payment thereof, with costs, and also a decree and order directing her said separate property to be sold to satisfy said finding and costs; or, if more consistent with equity, to order the rents thereof to be applied; and all other proper relief."

The bill of particulars filed with the complaint shows that the goods furnished the wife were mainly female wearing apparel.

The defendants demurred jointly and separately to the complaint: 1. That the court had no jurisdiction of the subject-matter of the action; 2. The improper joinder of said Hannah and her said husband as defendants; 3. That the complaint did not state facts sufficient to constitute a cause of action.

The court below sustained the demurrers as to the third cause, and overruled them as to the first and second.

Final judgment on demurrer for the appellees.

The opinion of Lord Romilly, M. R., in the case of *Shattock v. Shattock*, L. R. 2 Eq. 182, states the rule in equity as to the power of a married woman to deal with reference to her separate estate, where there are no restrictions upon its alienation:—

"The principle of the courts of equity relating to this subject, in my opinion, is, that, as regards her separate estate, a married woman is a *feme sole*, and can act as such; but only so far as is consistent with the other principle, namely, that a married woman cannot enter into a contract. These principles are reconciled in this way. Equity attaches to the separate estate of the married woman a quality incidental to that property, viz., a capacity of being disposed of by her; in other words, it gives her a power of dealing with that property as she may think fit; but the power of disposition is confined to that property, and the property must be the subject-matter that she deals with; and therefore, if she makes a contract, the contract is nothing unless it has reference, directly or indirectly, to that property. This is, in my opinion, the extent of the doctrine of equity relating to the separate estate of a married woman. It is on this principle that every bond, promissory note, and promise to pay, given by a married woman, has, for the reason I have already stated, been held to be a charge made by her on her separate estate; that is to say, it is a disposal of so much of her property, the whole

of which, if she pleased, she might give away. But if equity goes beyond this, it appears to me that it is laying down this principle, that where a married woman has separate estate she may bind herself by contract exactly as if a *feme sole*; or in other words, that the possession of separate property takes away the distinction between a *feme covert* and a *feme sole*, and makes them equally able to contract debts. It is clear that this implication of a charge cannot exist in the mere case of simple contract debts without one word said or written to show that the separate property is to be bound."

After reviewing the case of *Johnson v. Gallagher*, 30 L. J. Ch. 298, and the case of *Hulme v. Tenant*, 1 Bro. C. C. 16, and alluding to the fact that, on the first occasion, Lord Thurlow, in *Hulme v. Tenant*, *supra*, stated as the proper rule, "that a *feme covert* acting with respect to her separate property is competent to act in all respects as if she were a *feme sole*," and that, on the second occasion, the reporter, Mr. Brown, was not present, but reports *ex relatione*, and very shortly, and thus reporting states Lord Thurlow as laying down the broad doctrine, "that the separate estates of married women are liable for their general engagements," though the decree rendered is not consistent with this broad doctrine,—Lord Romilly then proceeds: "I must, therefore, consider the case of *Hulme v. Tenant* as only an authority for the principle to the extent I have stated it, and that it is in this limited form only that it is confirmed by Sir William Grant, in *Heatley v. Thomas*, 15 Ves. 596; that is, that the engagement need not be in writing, but if not in writing, it must be proved that it was entered into with an intention on the part of the married woman of making her separate estate liable to discharge that debt, and this intention will not be inferred from the mere circumstance of her contracting the debt. When I say that the engagement need not be in writing, of course there is this qualification,—that if the separate property of the married woman consists of real estate only, the statute of fraud applies as in every case affecting land; but if she have an absolute interest in personalty settled to her separate use, then a verbal agreement that her personal estate shall be liable to pay the debt will bind it."

After examining the case of *Field v. Soule*, 4 Russ. 112, and the anonymous case in 18 Ves. 258, the proper name of which is *Bruere v. Pemberton*, and the cases of *Gregory v. Lockyer*, 6 Madd. 90, and *Vaughan v. Vanderstegen*, 2 Drew. 165, this con-

clusion is reached: "The result is, that, in my opinion, the rule is, that the liability of the separate estate of a married woman is only created by something which operates as a specific charge upon it, and that this charge can be produced only by an intention on the part of the married woman to create such a charge. I adopt the expression of Sir John Leach, in *Stuart v. Kirkwall*, 3 Madd. 387, viz.: 'That a *feme covert* being incapable of contract, this court cannot subject her separate property to general demands. But that, as incident to the power of enjoyment of separate property, she has a power to appoint it, and that this court will consider a security executed by her as an appointment *pro tanto* of her separate estate.' The only alteration I would wish to make in this passage is to strike out the words 'appoint' and 'appointment,' and put in 'dispose of' and 'disposal,' because it is clear it is not an appointment; it is not intended as an appointment in any respect. It is quite certain it is not the execution of a power, and there is a constant discussion in the cases as to what it is. It is nothing more than this, that the married woman has certain property over which she has exactly the same power of disposition as if she were a *feme sole*, and therefore she may dispose of that property as she pleases; she does not 'appoint' it in the proper sense of the word; 'assign' would be much nearer; but it is, in point of fact, nothing more than a disposition. She disposes of the property, and equity enforces that."

In *Matthewman's Case*, L. R. 3 Eq. 781, this decision is approved; and it is held that the separate estate of a married woman is bound by her debts, obligations, and engagements, contracted for herself upon the credit of that estate; and whether such obligations were so contracted must be judged of by the circumstances of each particular case.

These, the most recently reported decisions of the English courts upon this question, we think, correctly state the rule as there recognized, in a case where no restriction is placed upon the power of alienation.

In the leading American case of *Methodist Episcopal Church v. Jaques*, 3 Johns. Ch. 77, where the English cases up to that time were fully reviewed by Chancellor Kent, he closes with this language: "I apprehend, we may conclude (though I certainly do it with unfeigned diffidence, considering how great talents and learning, by a succession of distinguished men, have been exhausted on the subject) that the English

decisions are so floating and contradictory as to leave us the liberty of adopting the true principle of these settlements. Instead of holding that the wife is a *feme sole*, to all intents and purposes, as to her separate property, she ought only to be deemed a *feme sole sub modo*, or to the extent of the power clearly given by the settlement. Instead of maintaining that she has an absolute power of disposition, unless specially restrained by the instrument, the converse of the proposition would be more correct, that she has no power but what is specially given, and to be exercised only in the mode prescribed, if any such there be. Her incapacity is general; and the exception is to be taken strictly, and to be shown in every case, because it is against the general policy and immemorial doctrine of law. These very settlements are intended to protect her weakness against her husband's power, and her maintenance against his dissipation. It is a protection which this court allows her to assume, or her friends to give, and it ought not to be rendered illusory. The doctrine runs through all the cases, that the intention of the settlement is to govern, and that it must be collected from the terms of the instrument. When it says she may appoint by will, it does not mean that she may likewise appoint by deed; when it permits her to appoint by deed, it cannot mean that giving a bond, or note, or parol promise, without reference to the property, or making a parol gift, is such an appointment. So when it says that she is to receive from her trustee the income of her property as it, from time to time, may grow due, it does not mean that she may, by anticipation, dispose at once of all that income. Such a latitude of construction is not only unauthorized by the terms, but it defeats the policy of the settlement by withdrawing from the wife the protection it intended to give her. Perhaps we may say that if the instrument be silent as to the mode of exercising the power of appointment or disposition, it intended to leave it at large to the discretion and necessities of the wife; and this is the most that can be inferred."

We have quoted fully from these well-considered decisions, for the sufficient reason that upon this vexed question no inconsiderable confusion has resulted from cases having been ruled upon a misapprehension of the exact point decided, or principle applied in some earlier decision. This error is avoided when the exact ruling is set out.

In the court of errors, this doctrine of Chancellor Kent was

modified so far as this, that a married woman would be regarded in a court of equity with respect to her separate estate as a *feme sole*, and may dispose of her estate as she pleases, if there be nothing in the deed of settlement requiring the consent or concurrence of her trustee, nor any negation of an unlimited power of disposition. In the later case of *Yale v. Dederer*, 22 N. Y. 450 [78 Am. Dec. 216], it was held that the instrument executed by a married woman must declare her intent to charge her separate estate, or the consideration received by her must go to the direct benefit of the estate. In *Manchester v. Sahler*, 47 Barb. 155, it was held that a married woman cannot charge her separate estate for a debt which did not arise in connection with it, and which is not for the benefit of her estate, or for her own benefit. In *Ballin v. Dillaye*, 37 N. Y. 35, it was held she might contract on the credit or for the benefit of her estate.

In *Willard v. Eastham*, 15 Gray, 328 [77 Am. Dec. 366], the rule is thus stated: "The true limitations upon the authority of a court of equity in relation to the subject are stated with great clearness and precision in the elaborate and well-reasoned opinion of the court of appeals in New York in the case of *Yale v. Dederer*, 18 N. Y. 265 [72 Am. Dec. 503]. And our conclusion is, that when by the contract the debt is made expressly a charge upon the separate estate, or is expressly contracted upon its credit, or when the consideration goes to the benefit of such estate, or to enhance its value, then equity will decree that it shall be paid from such estate or its income, to the extent to which the power of disposal by the married woman may go. But where she is a mere surety, or makes the contract for the accommodation of another, without consideration received by her, the contract being void at law, equity will not enforce it against her estate, unless an express instrument makes the debt a charge upon it."

The legislation on this subject in the different states very clearly indicates that the English rule has not been entirely satisfactory. Indeed, the remark of Judge Story, "that this holding, that a general security, executed by a married woman, purporting only to create a personal demand, and not referring to her separate property, shall be intended as *prima facie* an appointment or charge upon her separate property, is a strong case of constructive implication by courts of equity, founded more upon a desire to do justice than upon any satisfactory reasoning," seems to have called forth legislative action to con-

trol and limit this chancery power. Thus in the state of Maine, a married woman may sell and convey her own property, may sue or be sued in relation to her rights; and this is not confined to her separate property: *Springer v. Berry*, 47 Me. 330.

In Kentucky it is held, under their revised code, that a married woman cannot charge or alienate her estate but by order of a court of equity, and then only for exchange or reinvestment: *Daniel v. Robinson*, 18 B. Mon. 301. Her estate cannot be sold for debts by her contracted, as that would be to enable her to do indirectly what the statute prohibits her doing. In this case the husband and wife had jointly signed the note. The object of the statute was to protect married women against their own improvidence: *Williamson v. Williamson*, 18 Id. 329. The wife cannot now, by joining in a deed with her husband, convey her real estate: Id. 386. The same question is decided in *Stacker v. Whitleck*, 3 Met. (Ky.) 244.

In New Jersey, where the wife's property is protected against her husband and his creditors, still, as the statute does not authorize her to convey, her conveyance is void: *Naylor v. Field*, 30 N. J. L. 287. In *Johnson v. Parker*, 28 Id. 239, it was held that the land of a married woman was not liable under the mechanic's lien law for a building erected on the land under a contract with the husband, although the wife acquiesced and gave directions in relation thereto. The statute in that state requires a deed in order to convey or encumber.

It is held in Wisconsin that a woman may charge her separate estate, where she does so clearly, leaving the question open as to what circumstances in the absence of positive expressions would be deemed sufficient: *Heath v. Van Cott*, 9 Wis. 516. In *Conway v. Smith*, 13 Id. 125, the majority of the court held that, under their statute, the wife may give a note for materials furnished to improve her property, and that she may be sued at law, — Cole, J., dissenting, claiming that the case of *Wooster v. Northrup*, 5 Id. 245, was to the contrary. The statute provides that a married woman may hold to her sole and separate use, and convey and devise real and personal property, and any interest and estate therein, and the rents, issues, and profits, in the same manner and with like effect as if she were unmarried. It was held in *Conway v. Smith*, *supra*, and in *Todd v. Lee*, 15 Wis. 365, that the contracts of a *feme covert*, when necessary or convenient to the proper use and enjoyment of her separate estate, are binding at law.

It was held in Michigan, under their statute of 1855, that the wife may deed her land without her husband joining: *Farr v. Sherman*, 11 Mich. 33; *Watson v. Thurber*, 11 Id. 457. She need not, when acting with her husband, be examined separately. The husband may deed directly to the wife: *Burdene v. Amperse*, 14 Id. 91.

By the act of April 10, 1862, the legislature of New York provide that any married woman possessed of real estate as her separate property may bargain, sell, and convey such property, and enter into any contract with reference to the same, with the like effect in all respects as if she were unmarried, and she may enter usual covenants for title, which covenants, if broken, shall be obligatory to bind her separate property. Any married woman, while married, may sue and be sued in all matters having relation to her sole and separate property, or which may come to her by descent, devise, bequest, purchase, or the gift or grant of any person, in the same manner as if she were *sole*. She may sue for injury done to her person. She may execute any necessary bond in any action; and if the bond is broken or forfeited, her estate shall be liable. No bargain or contract made by the wife shall be binding upon the husband, and he is not liable for any costs. Judgments against a married woman may be enforced by execution against her own sole and separate property, in the same manner as if she were *sole*.

Under the legislation in Alabama, it is held that a husband and wife cannot enter into a mortgage of her statutory separate estate for the purpose of subjecting it to sale for the payment of the husband's debts: *Bibb v. Pope*, 43 Ala. 190.

In South Carolina, the late English doctrine is not recognized: *Ewing v. Smith*, 3 Desaus. Eq. 417 [5 Am. Dec. 557]; *Wilson v. Cheshire*, 1 McCord Eq. 233; *Magwood v. Johnson*, 1 Hill Eq. 228.

In Tennessee, in *Morgan v. Elam*, 4 Yerg. 375, after a full examination of the cases, the court came to the conclusion that a wife could not affect the title to the trust property except in the way and manner provided in the trust deed.

In *Lancaster v. Dolan*, 1 Rawle, 231 [18 Am. Dec. 625], the supreme court of Pennsylvania regret that the English decisions recognize the right of a married woman to dispose of or encumber her separate property, although the provisions in the trust deed do not specially authorize her to do so; and the court held that the wife had no power to convey, except to

the extent of the power clearly given in the conveyance. In *Cochran v. O'Hern*, 4 Watts & S. 95 [39 Am. Dec. 60], it is said: "Whatever uncertainty there may be in England as to the extent of the power of a *feme covert* over her separate estate, the law is well and judiciously settled in Pennsylvania, that a married woman is to be deemed to possess no power in respect to her separate estate but what is particularly given or reserved to her by the instrument creating the estate." *Thomas v. Folwell*, 2 Whart. 11 [30 Am. Dec. 230], discards the English rule. Such, also, is the case of *Chrisman v. Wagoner*, 9 Pa. St. 473. In *Wallace v. Coston*, 9 Watts, 137, it was held that a married woman had not charged her separate estate by an agreement to pay board for her aunt. The statute in that state provides: "In all cases where debts may be contracted for necessities for the support and maintenance of the family of any married woman, it shall be lawful for the creditor to institute suit against the husband and wife. He is first to have execution against the husband's estate or property, and on failure to make the money, may have execution against the separate estate of the wife." This proviso is added: "That judgment shall not be rendered for the plaintiff against the wife, unless it shall appear that the debt was contracted by the wife, or incurred for articles necessary for the support of the family of the said husband and wife." It was ruled in *Murray v. Keyes*, 35 Pa. St. 384, that the word "or" in the proviso is to be read "and"; that beyond proof that the debt was for necessities for the support of the wife's family, it must appear to have been contracted by the wife, or in her name by her authority. This was approved in *Barto's Appeal*, 55 Id. 386, where it was held a sufficient defense in a suit to charge her lands for improvements thereon, that she had not consented to the same.

In Iowa, by sections 2505 and 2506, it is declared that the husband is not liable on contracts made by the wife in relation to her separate property, or on those which purport to bind herself only; nor is the property of the wife, or the rents or income, liable for the debts of the husband. It is also provided that the expenses of the family, the education of the children, etc., shall be chargeable upon the property of both husband and wife, or either of them. Section 2508 allows "married women abandoned by their husbands to obtain authority from the district court to act, and to transact business as though unmarried." In giving construction to these sec-

tions, it was ruled, in *Jones v. Crosthwaite*, 17 Iowa, 393, that the purpose of the act was to protect the rights of married women in their property, but not to invest them with power to make contracts as a *feme sole*, and that their incapacity to make general personal contracts, except "for the expenses of the family," etc., is not removed.

In California, an act "defining the rights and duties of husband and wife," April 17, 1850, section 6, provides, with respect to the separate property of the wife, that the husband shall have the management and control during the continuance of the marriage, "but no sale or other alienation of any part of such property can be made, nor any lien or encumbrance created thereon, unless by an instrument in writing, signed by the husband and wife, and acknowledged by her upon examination separate and apart from her husband," etc.: Wood's Digest, 488. Under this law, it is held, in *MacLay v. Love*, 25 Cal. 367 [85 Am. Dec. 133], overruling *Miller v. Newton*, 23 Id. 554, in which Cope, C. J., had dissented, that a married woman has no power to create any charge, or lien, or encumbrance upon her separate estate, except by an instrument in writing, signed and acknowledged by the wife, as provided by law; that a court of equity has no power to enforce any claim or demand as a charge, lien, or encumbrance on the separate estate of a married woman, unless such claim or demand has become a charge, lien, or encumbrance thereon by virtue of a contract evidenced by an instrument in writing, signed and acknowledged by the wife. This ruling was recognized and affirmed in *Brown v. Orr*, 29 Id. 120; *Dentzel v. Waldie*, 30 Id. 138; and in *Smith v. Greer*, 31 Id. 476, where it was held she could not charge her separate estate by the execution of a promissory note.

In this state, it is declared that "no lands of any married woman shall be liable for the debts of her husband; but such lands, and the profits therefrom, shall be her separate property, as fully as if she was unmarried, provided that such wife shall have no power to encumber or convey such lands, except by deed, in which her husband shall join": 1 Gavin and Hord, p. 374, sec. 5.

It seems that by this provision a *feme covert* occupies the position in regard to her real estate which is recognized in England by the late cases,—that she is as to such estate a *feme sole*, restrained only by the statute here, as by the deed of settlement in England, in her power to encumber or dis-

pose of it. As the rule, however, is, that a *feme covert* cannot contract, and the power to do so in regard to her separate estate is the exception, it seems but the result of well-established legal principles to apply the doctrine stated by Chancellor Kent, and adopted by the New York, Massachusetts, New Jersey, Pennsylvania, Tennessee, and South Carolina courts, that the intent to deal with the property must appear, and is not to be assumed. And why should a court of equity enforce against the property of a married woman a contract void in law, and from which no benefit results to the property? The power to encumber has been always recognized as only resulting from her incidental power to dispose of her estate, and where the transaction in which she engages has no connection with that estate, and there is no purpose expressly indicated to charge the estate, we discover no ground upon which a court can declare an encumbrance of her property.

So far as the profits of her real estate are considered, she has the same power of disposition as a *feme sole*; and therefore, where she has indicated her purpose to deal with such profits, a court will give effect to her contracts.

Our statute clearly contemplates that the real estate of a married woman shall be a source of benefit and profit to her; and when it is remembered that to render such property available at the date this act was passed in this state, a reasonable amount of expenditure upon the property was required in a large proportion of the cases within its contemplation, and that the act was intended, as the policy of courts had always leaned, for the benefit of married women, and as a protection both against improvident husbands and against their own rash contracts, a construction of the statute giving them power to deal with their real estate so as to secure its benefits to themselves seems required and consistent with its spirit and language. A construction that would limit the right of the wife to deal in regard to her real estate so as to preserve her ownership, secure its enjoyment, or make it capable of yielding her an income, unless with the assent of her husband she executed a mortgage, would render her, as to that portion of her estate, entirely dependent upon the will of the very person against whose arbitrary acts the statute intended to guard her.

In the restricted interpretation given to their statute, we think the supreme court of California lost view of the purpose of the legislature. We regard a construction which permits the wife to deal with her lands so far as to render them a source of

profit and income, or of personal enjoyment and use, and so far as to protect her title, as in best accord with the spirit of our legislation.

We do not intend to be understood as implying that the general protecting supervision which has so long been exercised by courts of equity over the property of married women, protecting them from imposition and fraud, has been withdrawn by the statute. It must therefore appear that any contract relating to the property of a married woman, which is sought to be enforced in equity, is conscionable, and where it relates to the betterment of her real estate, that it is reasonably calculated to promote that end. Within this limitation it seems reasonable to conclude that, inasmuch as the statute makes the wife owner as a *feme sole* of the rents and profits of her real estate, and as the act is clearly intended for her benefit, a court of equity may permit her to contract with regard to her real estate so that an income may be derived therefrom.

The complaint in this case does not charge the wife with any intent to contract with regard to her separate estate. The fact that the goods were sold, and credit was given by the appellants on the faith of the property, is nothing more than an averment of their opinion of what was necessary to create a charge against the land or its income. Their intent, however, is not sufficient,—the married woman must also intend thus to contract.

The demurrer was therefore properly sustained to the complaint.

Judgment affirmed, with costs.

MARRIED WOMAN'S POWER TO CONTRACT AND BIND HER SEPARATE ESTATE THEREFOR: See note to *Johnson v. Oummins*, 84 Am. Dec. 147; note to *Partridge v. Stocker*, 84 Id. 673; *Macloy v. Love*, 85 Id. 133; *McCormick v. Holbrook*, 92 Id. 400, note 403; *Penn v. Whitehead*, 94 Id. 478.

WIFE IS ENTITLED TO PROFIT OF LAND WHEN: See *Rush v. Vought*, 93 Am. Dec. 769, note 774.

THE PRINCIPAL CASE WAS CITED IN each of the following authorities, and to the point stated: The separate estate of a married woman is not liable for her general engagements. Her capacity to enter into binding contracts exists only when she has a separate property, and when her contracts relate to that property: *In re Goodman*, 8 Nat. Bank. Reg. 382. The wife may, without the consent of her husband, contract for the repair and betterment of her real estate, and such contracts will be enforced in equity: *In re Goodman*, 5 Biss. 403; and she may employ counsel to protect her rights and interests in such estate: *Sharpe v. Clifford*, 44 Id. 349. She may make contracts in respect to her separate estate, creating a lien or charge upon it: *Cook v. Walton*, 38 Id. 229; *Moreau v. Branson*, 37 Id. 197. The principal case was explained in *Vail v. Meyer*, 71 Id. 163, showing that in the case of

a mechanic's lien it is not necessary that a married woman should intend to create a charge upon her estate. It is not the contract that gives the mechanic his lien. The principal case was referred to in *Johnson v. Tutewiler*, 35 Id. 355; *Crickmore v. Breckenridge*, 51 Id. 297; *Armstrong v. Nichols*, 32 Id. 408, as containing a learned discussion of the power of a married woman to encumber her real estate, or to contract with reference thereto. It was somewhat indefinitely cited in *McDaniel v. Carver*, 40 Id. 252; *De Armond v. Glasscock*, 40 Id. 421; *Falkner v. Colshear*, 39 Id. 203; *Hasheagan v. Specker*, 36 Id. 419; *Black v. Rogers*, 36 Id. 421; *O'Daily v. Morris*, 31 Id. 112.

POWER OF MARRIED WOMEN TO CONTRACT UNDER AMERICAN STATUTES —

1. FRAUDULENT CONVEYANCES TO WIFE, AND CONVEYANCES BETWEEN HUSBAND AND WIFE. — The states in which the following statutes are in force are sufficiently indicated by the citations. A conveyance made by the husband to the wife without valuable consideration is fraudulent as against the husband's creditors existing at the time of such conveyance: Revised Statutes of Maine, 1883, c. 61, sec. 1. So with any conveyance made to the wife upon consideration paid by the husband or out of his property: Id. A husband is not authorized to settle any of his property on his wife in any other manner or with any other effect than by law allowed: Public Statutes of Rhode Island, 1882, c. 166, sec. 14. A husband cannot convey his property to his wife: General Laws of New Hampshire, 1878. Transfers of property between husband and wife are forbidden, with certain exceptions as to wearing apparel and articles of personal adornment for the wife's use, to a value of not more than two thousand dollars, which she may receive as a gift from her husband, but such a gift made by a husband in fraud of his creditors is invalid: Public Statutes of Massachusetts, 1882, c. 147, sec. 3; Acts, etc., 1884, c. 132, sec. 1. No transfer of goods and chattels between a husband and wife who are living together is valid as against third persons, unless in writing, acknowledged, and recorded, like chattel mortgages: 1 Starr and Curtis's Annotated Statutes, Illinois, 1885, c. 68, par. 9. So in Mississippi, including lands: Revised Code of Mississippi, 1880, sec. 1178. In such case, possession has no effect: See last authority cited. A conveyance, transfer, or lien executed by either husband or wife to or in favor of the other shall be valid to the same extent as between other persons: Laws of Oregon, 1878, p. 93, sec. 5; 1 McClain's Annotated Statutes, Iowa, 1884, sec. 2206.

2. CONTRACTS BETWEEN HUSBAND AND WIFE. — In some states a married woman is not authorized to make contracts with her husband: General Laws of New Hampshire, 1878, c. 183, sec. 12; Public Statutes of Massachusetts, 1882, c. 147, sec. 2; Laws of New York, 1884, c. 381; Revision of New Jersey, 1709-1877, tit. Married Women, sec. 14. When property is owned by either husband or wife, the other has no interest therein which can be the subject of contract between them: 1 McClain's Annotated Statutes, Iowa, 1884, sec. 2203; Laws of Oregon, 1878, p. 92, sec. 2. In other states, however, all contracts between husband and wife are valid, except as hereinafter stated: Compiled Laws of New Mexico, 1884, sec. 1069; Statutes of Minnesota, 1878, c. 69, sec. 4; Code of North Carolina, 1883, secs. 1835, 1836. Either husband or wife may enter into any contract, engagement, or transaction with the other, or with any other person, respecting property, which either might enter into if unmarried, subject in transactions between themselves to the general rules which control the actions of persons occupying relations of confidence and trust towards each other: General Statutes of Nevada, 1885, sec. 517; Civil Code of California, sec. 158; Compiled Laws of

Dakota, 1867, sec. 2590; except contracts as to the real estate of either or any interest therein: Statutes of Minnesota, 1878, c. 69, sec. 4; and they cannot, by contract, alter their legal relations, except as to property: Civil Code of California, sec. 159; General Statutes of Nevada, 1885, sec. 518; Compiled Laws of Dakota, 1887, sec. 2591; and also with the exception that they may agree in writing to an immediate separation, and may make provision for the support of either of them and of their children during such separation: See last three authorities cited. And the mutual consent of the parties is a sufficient consideration for an agreement of the kind last named: See secs. 160, 519, 2592 of the last three respective authorities cited. Neither can a husband and wife enter into a contract with each other which is against public policy: Code of North Carolina, 1883, sec. 1836. Nor can they contract with each other for work and labor, so as to receive compensation therefor, one from the other; and the husband cannot rent the wife's plantation or carry on business with it on his own account; but all business done by him with the means of the wife is deemed to be done on her account by him as agent, unless a contract changing such relation be recorded: Revised Code of Mississippi, 1890, sec. 1177. In New Mexico, either the husband or wife may, in relation to all subjects, be constituted the agent or attorney in fact of the other: Compiled Laws of New Mexico, 1884, sec. 1089; but in Minnesota one cannot have from the other any power of attorney or other authority to convey the latter's real estate or any interest therein. But as to all other subjects, either may be constituted the agent of the other: Statutes of Minnesota, 1878, c. 69, sec. 4. In Alabama the husband and wife may contract with each other, subject to the rules of law as to contracts by and between persons standing in confidential relations; but the wife shall not, directly or indirectly, become the surety for the husband: Civil Code of Alabama, 1886, sec. 2349. Married women may loan money to their husbands, and take a judgment or mortgage as security therefor, in the name of a trustee, and such mortgage, etc., taken in good faith, is valid in law: Brightly's Purdon's Pennsylvania Digest, tit. Marriage, sec. 24. In all cases where the rights of creditors or purchasers in good faith come in question, the husband is held to have notice of the contracts and debts of his wife, and *vice versa*, the wife of the husband's: Statutes of Minnesota, 1878, c. 69, sec. 4; Compiled Laws of New Mexico, 1884, sec. 1089. In every case, where any question arises as to the good faith of any transaction between husband and wife, whether direct or by intervention of third persons, the burden of proof is on the party asserting the good faith: Washington Code, 1881, sec. 2397.

1. *Each may Constitute the Other his or her Attorney—Special Cases.*—In some of the states, a married woman may constitute the husband her attorney, or release to her husband the right to control her property, or any part of it, and to dispose of the income thereof for their mutual benefit; and may in writing revoke the same: Washington Code, 1881, sec. 2403; Laws of Delaware, 1871-73, vol. 14, c. 550, sec. 6; Revised Statutes of Maine, 1883, c. 61, sec. 2; Starr and Curtis's Annotated Statutes of Illinois, c. 68, par. 14; McClain's Annotated Statutes of Iowa, 1884, sec. 2210; Laws of Oregon, 1878, p. 93, sec. 6; Compiled Laws of New Mexico, 1884, sec. 1089. So a husband may constitute his wife such attorney: See last four authorities cited; Code of Georgia, 1882, sec. 1759. But proof must be made as in other cases of agency: See authority last cited. The wife may loan money to the husband, on security of a judgment or mortgage on his estate, in the name of a third person as her trustee, and the security will be good and valid: Brightly's

Purdon's Pennsylvania Digest, tit. Marriage, sec. 24. After his or her death, the administrator of a deceased husband or wife may pay debts due from the deceased to the wife or husband surviving, as if no marriage relation had subsisted between them: Revised Statutes of Maine, 1883, c. 64, sec. 61.

3. **MARRIED WOMAN'S RIGHT TO CONTRACT WITH THIRD PERSONS.** — In some of the states, a married woman may make contracts, oral or written, sealed or unsealed, as if she were unmarried: Compiled Laws of Kansas, 1885, sec. 3348; Compiled Statutes of Nebraska, 1887, c. 53, sec. 2; Howell's Annotated Statutes of Michigan, 1882, sec. 6295; Washington Code, 1881, sec. 2406; Revised Code of Mississippi, 1880, sec. 1167; General Laws of New Hampshire, 1878, c. 183, sec. 12; Public Statutes of Massachusetts, 1882, c. 147, sec. 2; Laws of Vermont, 1884, c. 140, sec. 1; Revision of New Jersey, 1709-1877, tit. Married Women, sec. 5; Revised Statutes of Indiana, 1881, secs. 5115-5117; Starr and Curtis's Annotated Statutes of Illinois, 1885, c. 68, par. 6; McClain's Annotated Statutes of Iowa, 1884, secs. 1935, 2213; Statutes of Minnesota, 1878, c. 69, sec. 2; Laws of Oregon, p. 92, sec. 1; General Laws of Colorado, 1877, sec. 1759; Compiled Laws of New Mexico, 1884, sec. 1088; Laws of New York, 1884, c. 381, sec. 2; 3 Revised Statutes of New York, 2338, including negotiable notes or bills; General Laws of Colorado, 1877, sec. 1758; but there are the following exceptions to the general rule above stated, viz.: In some states the wife must have the consent of the husband before she can make a contract: Compiled Laws of New Mexico, 1884, sec. 1088; expressed in writing: Civil Code of Alabama, 1886, sec. 2346; she cannot enter into a partnership, or carry on a partnership business, without the consent of the husband, unless he has deserted her, is idiotic or insane, or is confined in the penitentiary: Starr and Curtis's Annotated Statutes of Illinois, 1885, c. 68, par. 6; she cannot make contracts with her husband: Public Statutes of Massachusetts, 1882, c. 147, sec. 2; Laws of New York, 1884, c. 381, sec. 2; she cannot sell or convey her real estate except as shown *infra*; she is not liable as indorser, surety, or guaranty for her husband: Laws of Vermont, 1884, c. 140, sec. 1; Code of Georgia, 1882, sec. 1783; General Laws of New Hampshire, 1878, c. 183, sec. 12; or as surety, etc., for any person: Revised Statutes of Indiana, 1881, sec. 5119; Revision of New Jersey, 1709, 1877, tit. Married Women, sec. 5; Code of Georgia, 1882, sec. 1783; she is not liable on any undertaking made by her on the husband's behalf: General Laws of New Hampshire, 1878, c. 183, sec. 12; Code of Georgia, 1882, sec. 1783; or on behalf of any other person: Revision of New Jersey, 1709-1877, tit. Married Women, sec. 5; nor is she liable as an accommodation indorser, guarantor, or surety: See authority last cited; and any sale of the wife's separate estate made to a creditor of her husband in extinguishment of his debts is void: Code of Georgia, 1882, sec. 1783; so with any promise of hers to pay the debt, or answer for the default or liability of any other person: See New Jersey, *supra*. In some states the contracts of a married woman are generally void: Code of North Carolina, 1883, sec. 1826; Code of Georgia, 1882, sec. 2730; Compiled Laws of New Mexico, 1884, sec. 2757; except contracts for her necessary personal expenses, or for the support of the family, or to pay debts existing before the marriage: Code of North Carolina, 1883, sec. 1826. With these exceptions she cannot, in North Carolina, make contracts, unless made with the husband's written consent. Otherwise, however, if she be a free-trader: See authority last cited.

A married woman may contract for the purchase of a sewing-machine as if sole: Brightly's Purdon's Pennsylvania Digest, tit. Marriage, sec. 41; she may

sell and transfer shares owned by her of the capital stock of any railroad company, or other corporation, with like effect as if she were unmarried; or sell, assign, and transfer any mortgage or judgment which she owns, or satisfy the same of record: See authority last cited, secs. 40, 41, 44, 45; and married women may be corporators and officers of institutions incorporated for purposes of learning, benevolence, charity, or religion: *Id.*, sec. 48. A married woman may execute an official bond as principal, and be bound by her covenants of title in conveyances of her separate property as if sole: Revised Statutes of Indiana, 1881, sec. 5118. Any married woman entitled by gift or devise to any contingent estate, or interest in real or personal property, may, with the concurrence of her husband, compound and receipt for, assign, and convey the same, in all cases where she lawfully might, if a *feme sole*: Revision of New Jersey, 1709-1877, tit. Married Women, sec. 19. A married woman may give a refunding bond for a distributive share or legacy which will bind her estate and release the administrator as if she were sole: Brightly's Purdon's Pennsylvania Digest, tit. Marriage, sec. 36. A married woman may execute any bond, bill, note, or other instrument for the payment of money; and if the consideration thereof went to the benefit of her estate, she is liable thereon: General Laws of Colorado, 1877, sec. 1758. She may be authorized by the probate court to make contracts, and may execute deeds, or other instruments, in her own name, which may be necessary or proper to carry into effect the powers so granted to her: Howell's Annotated Statutes of Michigan, 1882, secs. 6267, 6268; and such contracts are binding on her: *Id.*, sec. 6270.

4. DEEDS BY MARRIED WOMEN.—In many of the states no married woman can convey or encumber her separate real estate, unless the husband joins in the deed, except, however, as specified *infra*: Laws of Vermont, 1884, c. 140, sec. 1; Revised Laws of Vermont, 1880, sec. 2325; Public Statutes of Rhode Island, 1882, sec. 4; Revision of New Jersey, 1709-1877, tit. Married Women, sec. 14; Revised Statutes of Ohio, 1883, sec. 4107; Revised Statutes of Indiana, 1881, sec. 5116; Statutes of Minnesota, 1878, c. 69, sec. 2; Revised Code of Maryland, 1878, art. 51, sec. 30; Revised Code of Delaware, as amended, etc., 1874, c. 83, sec. 4; *Id.*, c. 76, sec. 2; Amended Code of West Virginia, 1884, c. 66, sec. 3; Code of North Carolina, 1883, sec. 1256; Revised Statutes of Missouri, 1879, sec. 669; Revised Statutes of Texas, 1879, art. 559; Washington Code, sec. 2313; McClellan's Digest of Laws of Florida, c. 150, secs. 2, 9; Compiled Laws of New Mexico, 1884, sec. 1068; Howell's Annotated Statutes of Michigan, 1882, sec. 6288. The statute last cited also applies to her personal estate. So in Maryland, whether the conveyance of real or personal property be absolute or by way of mortgage: Revised Code of Maryland, 1878, art. 51, sec. 30. In Kentucky a married woman may convey her separate real or personal estate by joint deed of husband and wife, or by separate instrument; but in the latter case the husband must first convey, or have theretofore conveyed: General Statutes of Kentucky, c. 24, secs. 19, 20. In Maine a married woman may acquire real and personal property by descent, gift, or purchase, and may dispose of it without the joinder or assent of her husband; but she cannot convey real estate, directly or indirectly conveyed to her by her husband, or paid for by him, or given or devised to her by his relatives, without his joinder in the deed, except real estate conveyed to her as security, or in payment of a *bona fide* debt actually due to her from her husband: Revised Statutes of Maine, 1883, c. 61, sec. 1. But as exceptions to the rule above stated, that no married woman can convey or encumber her separate real estate unless the husband

joins in the deed, it may be stated that the wife may execute a mortgage on lands to secure the purchase-money: Statutes of Minnesota, 1878, c. 69, sec. 2; and may lease her land for terms not exceeding three years: *Id.*; Code of North Carolina, 1883, sec. 1834; Revised Statutes of Ohio, 1883, sec. 3103. In the authority last cited, the wife may in her own name, during coverture, make contracts for labor and materials for improving, repairing, and cultivating her separate real property. In North Carolina, *supra*, the wife's lease is not good if to begin more than six months after execution. In Michigan, *supra*, the wife may be authorized by court, without the husband's consent, to convey or encumber her separate real or personal estate. In Indiana the wife may be bound by an estoppel *in pais* as if sole: Revised Statutes of Indiana, 1881, sec. 5117.

In many of the states no separate property of the wife, real or personal, can be sold, conveyed, transferred, or encumbered by the husband, unless the wife consents by joinder in deed, etc.: Revised Laws of Vermont, 1880, sec. 2325; Public Statutes of Rhode Island, 1882, c. 166, sec. 5; General Statutes of Connecticut, 1888, sec. 2793; Revision of New Jersey, 1877, tit. Married Women, sec. 15; Brightly's Purdon's Pennsylvania Digest, 1883, tit. Deeds, sec. 104; tit. Marriage, sec. 13; Revised Statutes of Ohio, 1883, secs. 3108, 3109; Laws of Ohio, 1884, p. 209; Revised Statutes of Indiana, 1881, sec. 5128; Code of Virginia, 1873, c. 129, sec. 2; Amended Code of West Virginia, 1884, sec. 66, secs. 2, 3; Code of North Carolina, 1883, sec. 1840; Revised Statutes of Missouri, 1879, secs. 669, 3295; Revised Statutes of Texas, 1879, sec. 559; Washington Code, sec. 2313; Revised Statutes of Wyoming, 1887, sec. 1566; McClellan's Digest of Laws of Florida, c. 150, sec. 6; Revised Statutes of Idaho, 1887, sec. 2498. The statutes of Vermont, Virginia, Missouri, and Florida, on this subject, and cited *supra*, seem to include real estate only.

Husband and wife must join in conveyance of homestead, or in charging it with an encumbrance: See Statutes of Idaho last cited, sec. 3040; Revised Statutes of Texas, 1879, art. 560. Such consent of the wife must be evidenced by writing duly acknowledged by her before a judge: Brightly's Purdon's Pennsylvania Digest, 1883, tit. Marriage, sec. 13; or by joinder in the deed executed by husband and wife, as shown *infra*.

In some of the states any married woman may join with her husband in any conveyance of her real estate: General Laws of New Hampshire, 1878, c. 183, sec. 10; Revised Statutes of Maine, 1883, c. 73, sec. 14; Revised Laws of Vermont, 1880, sec. 1923; Public Statutes of Rhode Island, 1882, c. 166, sec. 7; Brightly's Purdon's Digest, 1883, tit. Deeds, secs. 22, 32; Revised Statutes of Ohio, 1883, sec. 4107; Revised Statutes of Indiana, 1881, c. 18, secs. 2921, 2943; Starr and Curtis's Annotated Statutes of Illinois, c. 30, par. 18; Statutes of Minnesota, 1878, c. 40, sec. 2; Revised Code of Maryland, 1878, art. 51, sec. 30; Revised Code of Delaware, as amended, etc., 1874, c. 83, sec. 4; Code of Virginia, 1873, c. 117, sec. 4; Amended Code of West Virginia, 1884, c. 66, sec. 3; Code of North Carolina, 1883, sec. 1256; General Statutes of Kentucky, 1883, c. 24, sec. 20; c. 52, sec. 3; Code of Tennessee, 1884, sec. 2891; Revised Statutes of Missouri, 1879, sec. 669; Digest of Arkansas Statutes, 1884, sec. 648; Revised Statutes of Texas, 1879, art. 559; Revised Statutes of Montana, 1879, p. 438, sec. 179; Civil Code of Alabama, 1886, secs. 2346, 2348; McClellan's Digest of Laws of Florida, c. 150, sec. 6; Compiled Laws of New Mexico, 1884, sec. 2756; Hill's Annotated Laws of Oregon, 1887, sec. 3003. In some of the states, such married woman must be of full age: General Laws of New Hampshire, 1878, c. 183, sec.

10; Public Statutes of Rhode Island, 1882, c. 166, sec. 7; but in others the minority of the wife shall not, in any case, affect the validity of the deed: Statutes of Minnesota, 1878, c. 40, sec. 2; Brightly's Purdon's Pennsylvania Digest, tit. Deeds, sec. 32. Lawful age in some of the states is eighteen years. The infant wife of an adult may join with the husband for the conveyance of the husband's real estate in Indiana: Revised Statutes of Indiana, 1881, sec. 2943. In that state the wife, if over eighteen and under twenty-one, may convey any interest in her husband's lands sold and conveyed by him, if she properly acknowledges the conveyance: *Id.*, sec. 2939; and in all sales by an infant *feme covert* of lands belonging to her, and in which sale and conveyance her husband has joined, he being of full age, said infant shall not be permitted to disaffirm said sale until she shall first restore to the person owning said real estate the consideration she received for said land: *Id.*, sec. 2944. The husband and wife may also convey real estate of the wife by deeds signed, sealed, acknowledged by each of them separately, and delivered: Public Statutes of Rhode Island, 1882, c. 166, sec. 7.

In some states the wife may execute and acknowledge all deeds, mortgages of her separate estate, bills of sale, or other conveyances, without the husband's joinder; except, probably, in all the states, as to the husband's curtesy or other rights, in the same manner as if she were unmarried and as other grantors: Public Statutes of Massachusetts, 1882, c. 147, sec. 1; Revised Statutes of Maine, c. 61, sec. 1; Laws of New York, 1884, c. 381, sec. 1; Revised Statutes of Wisconsin, 1878, secs. 2221, 2224, 2340; see also supplement thereto 497; McClain's Annotated Statutes of Iowa, 1884, sec. 1935; Compiled Laws of Kansas, 1885, c. 62, sec. 2; Compiled Statutes of Nebraska, 1887, c. 53, sec. 2, p. 506; Code of Tennessee, 1884, sec. 3347; Digest of Statutes of Arkansas, 1884, c. 104, sec. 4621; General Laws of Colorado, 1877, sec. 1759; Washington Code, sec. 2406; Civil Code of Dakota, 1885, secs. 82, 661; Revised Statutes of Wyoming, 1887, sec. 1559; Compiled Laws of Utah, 1876, secs. 647, 1020; Revised Statutes of South Carolina, 1882, sec. 2036; Revised Code of Mississippi, 1880, sec. 1193; Revised Statutes of Arizona, 1887, sec. 2103. In many states the wife executes the deed, when the husband joins, in the same manner and subject to the same rules as in other cases of deeds by joint grantors, and her act in acknowledging a deed so executed as if she were unmarried is binding upon her: General Laws of New Hampshire, 1878, c. 183, sec. 12; Public Statutes of Massachusetts, 1882, c. 147, sec. 2; Revised Statutes of Maine, 1883, c. 61, sec. 1; Revised Laws of Vermont, 1880, sec. 1923; Laws of New York, 1879, c. 249, sec. 1; Revised Statutes of Indiana, 1881, sec. 2938; Starr and Curtis's Annotated Statutes of Illinois, c. 30, par. 19; Howell's Annotated Statutes of Michigan, 1882, sec. 5662 a; Revised Statutes of Wisconsin, 1878, sec. 2224; McClain's Annotated Statutes of Iowa, 1884, sec. 1935; Laws of Minnesota, 1883, c. 99, sec. 2; Compiled Laws of Kansas, 1885, sec. 3348; Compiled Statutes of Nebraska, 1887, c. 53, sec. 2; Revised Code of Maryland, 1878, art. 51, sec. 30; Laws of Missouri, 1883, p. 21; General Laws of Colorado, 1877, sec. 1759; Compiled Laws of Dakota, 1887, sec. 2590; Revised Statutes of Wyoming, 1887, sec. 1559; Compiled Laws of Utah, 1876, secs. 647, 1020; Revised Statutes of South Carolina, 1882, secs. 2036, 2037; Civil Code of Alabama, 1886, sec. 2346; Revised Code of Mississippi, 1880, sec. 1193; Revised Statutes of Arizona, 1887, sec. 2103. All deeds, mortgages, and legal instruments may be executed by the wife, either alone or conjointly with the husband, and have the same legal force and effect as if she were unmarried: Revised Statutes of South Carolina, 1882, sec. 2036;

Revised Statutes of Wisconsin, 1878, secs. 2223, 2224; Starr and Curtis's Annotated Statutes of Illinois, c. 30, par. 19. But in other states the wife must acknowledge the deed, and her consent be proved by a separate examination or other formality: Public Statutes of Rhode Island, 1882, c. 166, sec. 8; Brightly's Purdon's Pennsylvania Digest, 1883, tit. Marriage, sec. 13; Revised Statutes of Ohio, 1883, secs. 4106, 4107; Revised Code of Delaware, as amended, 1874, c. 83, sec. 4; Code of Virginia, 1873, c. 117, sec. 4; Amended Code of West Virginia, 1884, c. 73, secs. 4-6; Code of North Carolina, 1883, sec. 1246, subd. 5, 6; General Statutes of Kentucky, 1883, c. 24, sec. 21; Digest of Statutes of Arkansas, 1884, secs. 648, 659; Code of Tennessee, 1884, sec. 2391; Revised Statutes of Texas, 1879, art. 559; Civil Code of California, secs. 1093, 1186, 1191; Hill's Annotated Laws of Oregon, sec. 3015; General Statutes of Nevada, 1885, secs. 530, 2590-2592; Washington Code, sec. 2313; Revised Statutes of Idaho, 1887, sec. 2956; Revised Statutes of Montana, 1879, p. 441, secs. 198, 199; McClellan's Digest of Laws of Florida, c. 32, sec. 11; Compiled Laws of New Mexico, 1884, sec. 2759.

No married woman can destroy or impair the husband's curtesy without his written assent: Public Statutes of Massachusetts, 1882, c. 147, sec. 1; Revision of New Jersey, 1877, tit. Married Women, sec. 14. Nor shall any judgment or decree against her affect his right of curtesy: See authority last cited. In Rhode Island any personal property other than chattels real, household furniture, plate, jewels, stock, or shares, money in a bank or secured by a mortgage, may be sold and conveyed by her as if sole; and she may make such contracts of sale accordingly. But this does not authorize her to transact business as a trader: Public Statutes of Rhode Island, 1882, c. 166, sec. 6. In Connecticut no sale or transfer of the wife's personalty, or any interest therein, is valid, unless the wife, or if she be dead, those in whom her estate has vested, or their guardians, join in a written conveyance thereof; and all reinvestments shall be in the name of the husband as trustee: General Statutes of Connecticut, 1888, sec. 2793. In other states, however, she may, without the consent of her husband, convey her separate estate, and make all contracts with reference to it, as if sole: Civil Code of California, sec. 162; Compiled Laws of Dakota, 1887, sec. 2590; McClain's Annotated Statutes of Iowa, 1884, sec. 1935; Revised Statutes of Arizona, 1887, sec. 2103; Code of Tennessee, 1884, sec. 3350; General Statutes of Nevada, 1885, sec. 517; General Laws of Colorado, 1877, sec. 1759; Hill's Annotated Laws of Oregon, 1887, sec. 2997; Revised Statutes of Wisconsin, 1878, sec. 2342; Compiled Statutes of Nebraska, 1887, c. 53, sec. 2; Revised Statutes of Wyoming, 1887, sec. 1559; Compiled Laws of Utah, 1876, secs. 647, 1020; Revised Statutes of South Carolina, 1882, sec. 2036; Revised Code of Mississippi, 1880, sec. 1193. In Arkansas a married woman may sell her separate personal property without the husband's consent, but he must be joined, as in other states shown above, in a transfer of her realty: Digest of Statutes of Arkansas, 1884, secs. 648, 4625. In Florida the husband and wife must join in all sales of the wife's property, whether personal or real: McClellan's Digest of Laws of Florida, c. 150, sec. 6. In Alabama the wife has full legal capacity to contract in writing as if she were sole, with the assent or concurrence of the husband expressed in writing; and the husband must, in the conveyance of her realty, manifest such assent by joining in the deed; but the personal property of the wife may be sold or conveyed by husband and wife, by parol, or otherwise: Civil Code of Alabama, 1886, secs. 2348, 2348. Where any married woman, not residing in this state, joins with her hus-

band in any conveyance of real estate situated within this state, the conveyance shall have the same effect, and may be acknowledged or proved, as if she were *sole*: Howell's Annotated Statutes of Michigan, 1882, sec. 5663; Hill's Annotated Laws of Oregon, 1887, sec. 3016. Every conveyance made by a husband and wife shall be deemed sufficient to pass all right of either in the property conveyed, unless the contrary appears on the face of the conveyance: McClain's Annotated Statutes of Iowa, sec. 1936.

5. SEPARATE EXAMINATION. — The wife must be separately examined, in many states, as to all conveyances of real estate in which she joins: See authorities cited *supra*. Thus "she shall be examined privily (apart from the husband), and declare that the instrument is her voluntary act, and that she does not wish to retract it": Public Statutes of Rhode Island, 1882, c. 166, sec. 8; Revised Statutes of Ohio, 1883, sec. 4107; Code of Virginia, 1873, c. 117, sec. 4; Amended Code of West Virginia, 1884, c. 73, sec. 4; Revised Statutes of Texas, 1879, arts. 559, 4310; Civil Code of California, sec. 1186; General Statutes of Nevada, 1885, secs. 530, 2591; Revised Statutes of Idaho, 1887, sec. 2960; Revised Statutes of Montana, 1879, p. 441, sec. 198; Revised Code of the District of Columbia, 1857, c. 48, sec. 21. In other states, the form of acknowledgment, so far as it expresses the wife's examination, is as follows: "And the said Mary Smith, being at the same time privately examined by me apart from her husband, acknowledged that she executed the said indenture willingly, without compulsion or threats, or fear of her husband's displeasure": Revised Code of Delaware, 1874, c. 36, sec. 8; Brightly's Purdon's Digest, 1883, tit. Deeds, etc., sec. 22; Revision of New Jersey, 1877, tit. Conveyances, sec. 9; Code of North Carolina, 1883, sec. 1246, subd. 7; Code of Tennessee, 1884, sec. 2891; Revised Statutes of Missouri, 1879, sec. 680; McClellan's Digest of Laws of Florida, c. 32, secs. 11, 150; Compiled Laws of New Mexico, 1884, sec. 2759; and in others it is sufficient if the wife acknowledge before the officer — that is, without private examination — that she joined of her own free will and consent, without any compulsion or force used by her husband: Code of Tennessee, 1884, sec. 2891; Digest of Statutes of Arkansas, 1884, sec. 659; 2 Hill's Annotated Laws of Oregon, 1887, sec. 3015; Washington Code, 1881, sec. 2313; Code of Georgia, 1882, sec. 2706 a. The officer must examine the wife separately, and read the full contents of the conveyance to her; and she must declare that she executed it voluntarily, and without coercion: Brightly's Purdon's Pennsylvania Digest, 1883, tit. Deeds, sec. 22; Revised Statutes of Ohio, 1883, sec. 4107; and probably the same in some other states. The wife must be made acquainted with the contents of the instrument: General Statutes of Kentucky, 1883, c. 24, sec. 21; Revised Statutes of Texas, 1879, sec. 4310; General Statutes of Nevada, 1885, sec. 2591; Revised Statutes of Idaho, 1887, sec. 2956; Revised Statutes of Montana, 1879, p. 441, sec. 198; Compiled Laws of New Mexico, 1884, sec. 2759. The writing must be fully explained to her: Revised Code of the District of Columbia, 1857, c. 48, sec. 21; Amended Code of West Virginia, 1884, c. 73, sec. 4; and it must be acknowledged by her privily, apart from the husband: Revised Statutes of Idaho, 1887, sec. 2956; Code of North Carolina, 1883, sec. 1256; General Statutes of Kentucky, 1883, c. 24, sec. 21; Revised Statutes of Texas, 1879, art. 4310; Revision of New Jersey, 1877, tit. Conveyances, sec. 9. If, on separate examination as above, she refuse to consent, only the husband's estate will be conveyed by the instrument: Public Statutes of Rhode Island, 1882, c. 166, sec. 9. It is deemed unnecessary here to go further into the details of the examination and certificate of acknowledgment. It may be stated, however, that the examination

may generally be made at home or abroad, before any person authorized to take the acknowledgment of deeds; but in some cases it must be before certain officers, and must be certified by such officer on the deed, and recorded with it. The married woman must be personally known to such officer, or her identity proved; and the certificate must set forth that the woman was known to the officer, or her identity proved by the required number of witnesses whose names are inserted, and that her separate examination was made in conformity with the statutory requirements. The statutes on these points are collected in Stimson's excellent and accurate work on American Statute Law, sec. 6501. In some of the states there are statutory forms of the certificate of acknowledgment: See Revised Statutes of Idaho, 1887, sec. 2960; Code of Tennessee, 1884, sec. 2891; Code of North Carolina, 1883, sec. 1246, subd. 7; Revised Code of Delaware, 1874, c. 83, sec. 9; Revised Statutes of Texas, 1879, art. 4313; Civil Code of California, sec. 1191; Code of Virginia, 1873, c. 117, sec. 4; Amended Code of West Virginia, 1884, c. 73, sec. 4; General Statutes of Kentucky, 1883, c. 24, sec. 21. If the deed, or a deed releasing dower, be executed by an attorney of the wife, his power must be executed with the same examination and formality as required above: Public Statutes of Rhode Island, 1882, c. 166, sec. 10. The private examination remains valid, although the deed be not recorded: Revised Code of Delaware, 1874, c. 83, sec. 16.

6. RELEASE OF DOWER AND HOMESTEAD — POWERS OF ATTORNEY. — Any married woman may release her dower by proper joinder in the deed with the husband: General Laws of New Hampshire, c. 183, sec. 10; Public Statutes of Rhode Island, 1882, c. 166, sec. 11; Revision of New Jersey, 1877, tit. Conveyances, sec. 9; Brightly's Purdon's Pennsylvania Digest, 1883, tit. Deeds, sec. 109; Revised Statutes of Ohio, 1883, sec. 4107; Starr and Curtis's Annotated Statutes of Illinois, c. 30, par. 19; Revised Statutes of Wisconsin, 1878, sec. 2222; Revised Code of Maryland, 1878, sec. 30; Code of Virginia, 1873, c. 117, sec. 7; Revised Statutes of Missouri, 1879, sec. 669; Digest of Statutes of Arkansas, 1884, sec. 649; Washington Code, sec. 2313; Revised Statutes of South Carolina, 1882, sec. 1797; Code of Georgia, 1882, sec. 2706 a; McClellan's Digest of Laws of Florida, c. 95, sec. 15; or with her husband's guardian: See Rhode Island and Wisconsin, *supra*; whether she be of full age or not: See New Hampshire, *supra*; though in Wisconsin, Ohio, and Illinois, *supra*, she must be of the age of eighteen or upwards. In South Carolina, *supra*, sec. 1796, the wife may renounce her dower by a simple renunciation before an officer, without a deed of conveyance for that purpose. In Florida, sec. 14, Rhode Island, sec. 12, Wisconsin, sec. 2221, Maryland, Kentucky, secs. 19, 20, *supra*, the wife may relinquish her dower by separate deed. And such a deed, the husband's interest having been previously divested by process of law or otherwise, may be executed by the wife in all respects as if sole: Starr and Curtis's Annotated Statutes of Illinois, 1885, c. 30, par. 18; Revised Statutes of Wisconsin, 1878, sec. 2222. As the wife is to join in or execute a deed, it necessarily follows that the formalities of separate examination, etc., as shown under that head, *supra*, will be required. While a mortgage of the owner of the homestead made at the time of its purchase to secure the purchase-money is valid, the husband and wife, if both are living, must join in a deed, in order to release a homestead interest belonging to either: General Laws of New Hampshire, 1878, c. 138, secs. 2, 3. In New York any married woman aged twenty-one may execute and deliver her power of attorney to convey land, as if sole: Laws of New York, 1878, c. 300, sec. 1; Revised Statutes of Wisconsin, 1878, sec.

2224. And in other states a wife may convey her land by power of attorney, if executed and acknowledged like a deed, duly certified, and it specifies the lands to be conveyed: Revised Statutes of Wisconsin, 1878, sec. 2222; Revision of New Jersey, 1877, tit. Conveyances, secs. 11, 12; Revised Statutes of Ohio, 1883, sec. 4106; Revised Statutes of Indiana, 1881, sec. 2949; Howell's Annotated Statutes of Michigan, 1882, sec. 5725; Statutes of Minnesota, 1878, sec. 2; Code of North Carolina, sec. 1257; Revised Statutes of Missouri, 1879, sec. 670; Civil Code of California, sec. 1094; General Statutes of Nevada, 1885, sec. 531; McClellan's Digest of Laws of Florida, sec. 11; General Statutes of Kentucky, 1883, c. 24, sec. 36. In the authority last cited, she can convey her estate 'in Kentucky by power of attorney only when she is a non-resident of that state. The wife may also release dower by power of attorney in the same way that she may convey her land by such agent: See Ohio, Florida, Missouri, *supra*. Such power may be revoked by the wife at any time before a sale, but the revocation is inoperative until recorded in the county where the lands are: Revised Statutes of Ohio, 1883, sec. 4109.

7. COVENANTS. — In Indiana a married woman is bound by her covenants of title in conveyances of her separate property, as if sole: Revised Statutes of Indiana, 1881, sec. 5118. A married woman shall not be bound by any covenant or warranty in a joint deed of herself and husband: Compiled Statutes of Nebraska, 1887, c. 73, sec. 48; Revised Laws of Vermont, 1880, 1923; Code of Virginia, 1873, c. 117, sec. 7; Hill's Annotated Laws of Oregon, sec. 3003; unless it is expressly so stated on the face of the deed: McClain's Annotated Statutes of Iowa, 1884, sec. 1937. In Delaware such a deed shall not bind her to any warranty except a special warranty against herself and her heirs, and all persons claiming by or under her; and no covenant on her part of a more extensive or different effect in such deed shall be valid against her: Revised Code of Delaware, 1874, sec. 4; and in Missouri no covenant, expressed or implied, in such deed, shall bind the wife or the heirs, except so far as may be necessary effectually to convey, from her and her heirs, all her right, title, and interest expressed to be conveyed therein: Revised Statutes of Missouri, 1879, sec. 669. In New Jersey a married woman may bind herself in such a deed by covenants of title as to the lands conveyed, provided that such covenants, except so far as they relate to the lands, or some interest therein owned by her in her own right, shall have no greater or other effect than to estop her and all persons claiming as heirs, or by or through her in the same manner as if she were a single woman: Revision of New Jersey, 1877, tit. Married Women, sec. 7. In New York a wife may enter into the usual covenants of title as to real estate, and bind her separate property thereby: Laws of New York, 1860, c. 90, sec. 3; 3 Revised Statutes of New York, p. 2338. In all deeds of real estate or chattels real made to a married woman, she may bind herself and assigns by any covenant running with or relating to the said real estate or chattels real, as if sole: Revised Code of Maryland, 1878, art. 51, sec. 29. And she is bound by the covenants in a lease which becomes vested in her: Laws of Maryland, 1882, c. 395, sec. 1.

8. PERSONALTY — VALIDATING STATUTES — INSURANCE, AND OTHER MATTERS. — The husband and wife, in a few states, must join in all sales, transfers, and conveyances of the wife's personal property: Revised Code of Maryland, 1878, art. 51, sec. 30; McClellan's Digest of Laws of Florida, c. 150, sec. 6. In numerous states are found statutes making deeds, etc., valid which have been previously executed, where the wife's joinder was attended with some omission or informality: See authority last cited, sec. 38,

46; *Id.*, tit. Deeds, secs. 64-69, 76-78, 105, 106, 110, 111; Howell's Annotated Statutes of Michigan, sec. 5662 a; Revised Code of Delaware, 1874, c. 83, sec. 5; Acts of West Virginia, 1883, c. 13; General Statutes of Kentucky, 1883, c. 24, sec. 38; Code of Tennessee, 1884, sec. 2896; McClellan's Digest of Laws of Florida, c. 150, secs. 10, 20. A married woman may, in her own name, or in the name of a trustee, have her husband's life insured for her own use: Amended Code of West Virginia, 1884, c. 66, sec. 5; Code of Tennessee, 1884, sec. 3336; Revision of New Jersey, 1877, tit. Married Women, sec. 20; Civil Code of Alabama, 1886, sec. 2356; Digest of Statutes of Arkansas, sec. 4623; Revised Statutes of Wisconsin, 1878, sec. 2347; Revised Code of Delaware, c. 76, sec. 3; or that of her children: See Alabama, *supra*. So may she insure the life of her son, or other person, for her sole use: See Wisconsin, *supra*. See also, on this point of insurance, 3 Revised Statutes of New York, 1882, p. 2339. In some of the states a married woman may make valid contracts concerning her real and personal estate, where she has been abandoned by her husband: Revised Statutes of Maine, c. 61, sec. 7; Compiled Laws of New Mexico, 1884, sec. 1090; Statutes of Rhode Island, 1882, c. 167, sec. 23; and possibly in other states; or where he is insane: See Maine, *supra*; or where she is living in a state of separation from him: Supplement to Revision of New Jersey, 1886, tit. Married Women, sec. 3. A married woman may purchase property, take conveyances, and make contracts, as if unmarried: Revised Statutes of South Carolina, 1882, sec. 2037; General Laws of Colorado, 1877, secs. 1759, 1761. She may make contracts, and they will bind her as if she were unmarried: Washington Code, 1881, sec. 2406; Hill's Annotated Laws of Oregon, sec. 2997, and authorities cited in subdivision 3, *supra*. The wife may contract debts for necessities for herself and children upon the credit of her husband: Revised Statutes of Arizona, 1887, sec. 2107. Married persons selling lands under false representations are guilty of a felony: Revised Statutes of Idaho, 1887, sec. 7098. No contract, whether expressed or implied, shall bind any married woman or her heirs, except when it becomes necessary for said married woman and her heirs to transfer all the right, title, and interest implied as transferred by the conveyance: Compiled Laws of New Mexico, 1884, sec. 2757. When a husband and wife hold land as tenants, joint or in common, or, in New York, by "entireties," they may make valid partition among themselves, which will bar dower if so expressed in the instrument: Laws of New York, 1880, c. 472, sec. 1.

9. FREE TRADERS. — There is, in many states, a certain process by which a married woman can become a sole trader, a free trader, a free dealer, a public merchant, or by which she may carry on business in her own name. And in several of the states, these privileges are extended to her without formalities of any kind: See Stimson's American Statute Law, secs. 6520, 6521, where the statutes are collected and the process shown by which she may become a sole trader. The effect of this *status* is, that the woman may contract and deal in all respects as if sole: Code of North Carolina, 1883, sec. 1828; Code of Georgia, 1882, sec. 1760; Stimson's American Statute Law, sec. 6522.

10. LOUISIANA. — All married women in this state, over the age of twenty-one years, may, by and with the authorisation of their husbands, borrow money or contract debts for their separate benefit and advantage; and to secure the same, grant mortgages or other securities affecting their separate estate, paraphernal or dotal, provided she is examined separate and apart from her husband by a judge, and the latter makes a proper certificate of such examination to the notary who is to act for the woman. She must be examined

touching the objects for which the money is to be borrowed or debt contracted; and the judge must be satisfied that the money about to be borrowed, or debt contracted, is solely for her separate advantage, or for the benefit of her separate or dotal property. Otherwise, neither she nor her separate or dotal property will be bound: Revised Laws of Louisiana, Vohles, 1884, secs. 1713-1715. Such woman, with the consent of her husband, may renounce, in favor of third persons, her matrimonial, dotal, paraphernal, and other rights, provided the notary explains verbally to her, without her husband's presence, the nature of her rights and of the contract she agrees to: *Id.*, sec. 1717. She also may appoint an agent during her temporary or permanent absence from the state to intervene in any contract of mortgage or sale made by her husband, and sign in her behalf such renunciation of said mortgage or privilege as the wife herself might do if personally present: *Id.*, sec. 1718.

LINDLEY v. CROSS.

[31 INDIANA, 106.]

STATUTE CONTAINING TWO INCONSISTENT PROVISIONS MUST BE CONSTRUED so as to effect the legislative intention.

MARRIED WOMAN HAS SUCH POWER OVER HER SEPARATE REAL PROPERTY as is incident to a complete holding; and if an improvement is necessary for a complete enjoyment, then she can charge it with a debt created in making such improvement.

IN COMPLAINT ON CONTRACT AGAINST MARRIED WOMAN, IT MUST APPEAR AFFIRMATIVELY that the contract was for the benefit of her separate property.

SUPERVISION OF EQUITY OVER POWER OF MARRIED WOMAN TO ENCUMBER HER SEPARATE PROPERTY. Such a power is liable to abuse, and must be under the supervision of the court of equity which tries the case involving the liability of her separate property.

MECHANIC'S LIEN, NOTICE, OR CLAIM IS VOID IF IT DOES NOT DESCRIBE PREMISES upon which the lien is claimed, and cannot be reformed in equity.

WIFE MAY, UNDER PROPER CIRCUMSTANCES, BE HELD AS INVOLUNTARY TRUSTEE OF HER HUSBAND.

RESULTING TRUST RAISED BY FRAUDULENT CONVEYANCE, AND CREDITOR'S REMEDY. — If real estate is conveyed to one person for a valuable consideration, which is paid by another, for the purpose of defrauding the creditors of the latter, such a creditor may, under the code, have a complete remedy in one action. A judgment may be obtained against the debtor, and the real estate in question be subjected to the payment of the judgment.

THE facts are stated in the opinion.

F. T. Hord, for the appellants.

W. and W. W. Herod, for the appellees.

By Court, GREGORY, J. Suit by the appellants against the appellees. The complaint is in two paragraphs. The first

avens that Susan Cross, being the owner in fee of lots 3 and 4 in Judd's addition to the town of Elizabethtown, in Bartholomew County, undertook, with her husband, Thomas, to erect, and did erect, thereon a new building, to wit, a dwelling-house; that defendant Thomas, with the knowledge and consent of Susan, and as her agent therefor, purchased of the plaintiffs lumber for the building, which was furnished and delivered under the contract by the plaintiffs to the defendants, a bill of particulars of which is set forth, amounting in the aggregate to \$158.58; that the lumber was used in the building, and became a part thereof; that prior to the expiration of sixty days from the furnishing of the lumber and the completion of the building, the plaintiffs filed a notice in the recorder's office of Bartholomew County, intending thereby to retain and hold a lien on the property for the payment of the lumber so furnished; that by mistake there was and is a misdescription in the notice, the property being described therein as lots "6 and 7," instead of "3 and 4"; that Susan is still the owner of the property; that no third persons have acquired any rights that would in any way be affected by a correction of the mistake; and that this was the only lumber ever furnished by the plaintiffs to the defendants. A copy of the notice is made a part of the complaint.

The second paragraph charges that on, etc., the defendant Thomas Cross purchased from one Oliver Judd lots 3 and 4, in Judd's addition to the town of Elizabethtown, in Bartholomew County, and paid a portion of the purchase-money therefor, and gave his note for the residue, with one W. W. Leek as surety thereon, which yet remains unpaid; that said Thomas, on, etc., caused Judd to convey the property to Susan, the wife of said Thomas; that the conveyance was not recorded until the 30th of July, 1866; that after the purchase the defendant Thomas undertook to and did build on said lot a new dwelling-house, and said defendant, on the 1st of June, 1866, employed plaintiffs to furnish lumber, as set forth in the bill of particulars filed with the complaint, amounting to \$158.58; that the defendant Thomas, to induce the plaintiffs to furnish the lumber, represented to them that he was the owner of the lots; that at the time of the contract Judd had not made a deed to any one therefor, but said Thomas held the same by title-bond; that relying on the representation, and believing said Thomas to be the owner thereof, the plaintiffs furnished the lumber under the contract from the date thereof to the 27th of July,

1866, which was used in the construction of the building; that Susan Cross knew that the plaintiffs were furnishing the lumber, and concealed from them the fact of her title; that the lumber was furnished with her approbation and under her encouragement; that the conveyance to Susan Cross was fraudulent and void; that said Thomas, being indebted to Judd for the residue of the purchase-money, and seeking to defraud Leek, the surety, and in case the claim could not be collected of Leek, to cheat and defraud Judd, and to cheat and defraud other creditors, and especially the plaintiffs, caused the conveyance to be executed to Susan Cross, his wife; that Thomas Cross is wholly and notoriously insolvent, having no property other than said real estate; that the conveyance to the wife was without any consideration whatever passing from her. This paragraph then charges the notice and mistake as set forth in the first.

The appellee Susan Cross filed her separate demurrers to each paragraph of the complaint. The appellee Thomas Cross also filed his separate demurrers to each paragraph of the complaint. The demurrers were sustained, and judgment was rendered against the appellants.

The act of May 31, 1852, touching the marriage relation and liabilities incident thereto, provides that "no lands of any married woman shall be liable for the debts of her husband; out such lands and the profits therefrom shall be her separate property, as fully as if she was unmarried; provided that such wife shall have no power to encumber or convey such lands, except by deed, in which her husband shall join": 1 Gavin and Hord, p. 374, sec. 5. The power of a married woman over her lands under this provision of the statute has been the subject of frequent investigation without coming to any very satisfactory conclusion on the subject: See *Major v. Symmes*, 19 Ind. 117; *Cox v. Wood*, 20 Id. 54; and *Moore v. McMillen*, 23 Id. 78.

In *Kantrowitz v. Prather*, 31 Ind. 92 [*ante*, p. 587], this court has granted a rehearing, after much consideration, and has decided the case otherwise at this term.

We are satisfied that this question must be solved by a construction of our own legislation on this subject.

The section cited has in it two inconsistent provisions,—one, that such lands and the profits therefrom shall be the wife's separate property as fully as if she was unmarried; and the

other, that she shall have no power to encumber or convey except by deed, in which her husband shall join.

To give full force to the latter provision, the wife could do nothing with her lands except to occupy and cultivate them in person; she could make no lease; she could not contract to repair or improve them; and the first provision would amount to little or nothing.

The code provides, that "when a married woman is a party, her husband must be joined with her, except,—1. When the action concerns her separate property, she may sue alone; 2. When the action is between herself and her husband, she may sue or be sued alone; but in no case shall she be required to sue or defend by guardian or next friend, except she be under the age of twenty-one years": 2 *Gavin and Hord*, p. 41, sec. 8.

If a married woman can sue or be sued alone, in respect to her separate property, it seems to be fair to allow her the power of contracting for such aid as she may require in conducting the litigation. It seems clear that the legislature intended to confer upon her the full power of enjoyment, with a restriction on her power to encumber or alienate. Whatever power, then, is incident to a complete holding, would seem to be conferred upon her by a fair construction of the statute.

If the improvement in question was necessary and proper for a full and complete enjoyment, then the wife could charge her separate property with the debts created in making it.

The first paragraph, however, is bad, for the want of averment showing that the dwelling-house was necessary and proper for a full and complete enjoyment by the wife of the lots in question.

The question of the power of a married woman to make new improvements, being a power liable to abuse, must be under the control of the court trying the case involving the liability of her separate property to answer for the debts created in making such improvements.

The lien of the mechanic or material-man is created by statute, and before either can avail himself of such a lien the statute must be complied with.

The notice charged in each paragraph of the complaint was insufficient to create the lien, and the court had no power to reform it.

The second paragraph is good. It shows a liability of the husband for the debt, and that the holding of the wife is in

trust for her husband. Under the code, complete relief can be granted. A judgment may be obtained against the husband for the debt, and the lots in question subjected to the payment of the judgment.

Judgment reversed, with costs; cause remanded, with direction to overrule the demurrer to the second paragraph of the complaint, and for further proceedings.

STATUTES SHOULD BE SO CONSTRUED AS TO EFFECT LEGISLATIVE INTENT: See *Pickering v. Day*, 95 Am. Dec. 291, note 313; *Tynan v. Walker*, 95 Id. 152; *Gates v. Salmon*, 95 Id. 139.

PETITION IN ACTION ON CONTRACT AGAINST MARRIED WOMAN NEED NOT STATE FACTS showing that it relates to her separate property when: See *McCormick v. Holbrook*, 92 Am. Dec. 400.

SUPERVISION OF EQUITY OVER ESTATES OF MARRIED WOMEN: See *MacLay v. Love*, 85 Am. Dec. 133, note 144; *Rogers v. Ward*, 85 Id. 710.

POWER OF MARRIED WOMAN OVER HER SEPARATE ESTATE: See *Kantrowitz v. Prather*, *ante*, p. 587.

MECHANIC'S LIEN, DEFECTIVE DESCRIPTION IN, EFFECT OF: See *Kennedy v. House*, 80 Am. Dec. 594, note 596.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: The purpose of the code is to settle all disputes in one civil action: *Quarl v. Abbett*, 102 Ind. 244; *Field v. Holman*, 93 Id. 209. Thus a suit may be brought to obtain judgment on a note, and to set aside a fraudulent conveyance: See case last cited. The law as to the power of a married woman to encumber her real estate, or contract with reference thereto, is in a measure still unsettled in Indiana: *Johnson v. Tutweiler*, 35 Id. 355. As a general rule, she is incapable in law of making a contract; but as an exception, she may make some contracts in reference to her separate estate, which will create a charge thereon: *Moreau v. Branson*, 37 Id. 197; *Cook v. Walton*, 38 Id. 229. But they must be conscionable, and for the betterment of her estate, and be reasonably calculated, when made with reference to her real estate, to make the estate profitable to her, to preserve the property, or to protect and defend her title thereto: *Thomas v. Passage*, 54 Id. 113. The principal case was somewhat indefinitely cited in *Vail v. Meyer*, 71 Id. 163; *Crickmore v. Breckenridge*, 51 Id. 297; *Sharps v. Clifford*, 44 Id. 349; *Falkner v. Colehear*, 39 Id. 203; *Black v. Rogers*, 36 Id. 422; and distinguished in *City of Crawfordsville v. Johnson*, 51 Id. 399.

COLUMBUS AND INDIANAPOLIS CENTRAL RAILWAY COMPANY v. ARNOLD.

[81 INDIANA, 174.]

COMPLAINT CHARGES SUFFICIENT CAUSE OF ACTION FOR INJURY CAUSED THROUGH DEFECTIVE MACHINERY of railroad company when it states what defects were in the machinery; that defendant had full notice thereof; that, nevertheless, he carelessly and recklessly caused the same to be used; that by reason of such use and defects, a fireman, an employee of the company, was injured; and that said servant had no knowledge, or means of knowing, of such defects.

MASTER OR EMPLOYER IS NOT LIABLE FOR DAMAGES FOR DEATH OF HIS SERVANT, if the employees of the master having the care and management of the machinery which caused the death, and of its repairs and condition, were competent, and usually careful in the discharge of their duties, although the death was caused by the carelessness of such employees.

MASTER OR EMPLOYER IS NOT LIABLE TO SERVANT FOR INJURIES CAUSED SOLELY BY CARELESSNESS or negligence of another employee of the same master. The master is not an insurer, unless he expressly so stipulates. The fact that the servant who is injured is inferior in grade to, and is under the command of, the servant whose neglect caused the injury does not change this rule, if both are engaged in the same general business.

MASTER IS NOT LIABLE FOR INJURY CAUSED TO ONE OF HIS SERVANTS BY CO-SERVANT, though the latter is not engaged in the operation or particular work. It is enough to exempt the master from liability that the servants are both in the employment of the same master, engaged in the same common enterprise.

CORPORATION CAN BE HELD LIABLE FOR INJURIES TO ITS SERVANTS only when the injury has been caused by the neglect of its board of directors to perform some duty which devolved upon them.

BOARD OF DIRECTORS OF RAILROAD COMPANY ARE ITS IMMEDIATE REPRESENTATIVES, and occupy the relation of master to the various employees engaged in operating the road and superintending and performing the business of the company in its various departments.

MASTER-MACHINIST IS FELLOW-SERVANT OF FIREMAN. — A master-machinist who has the immediate charge, control, and direction of the engines and other machinery of a railroad company, and the repairs thereof, and the control and direction of the engineers and firemen on the trains, is a fellow-servant of such a fireman.

RAILROAD CORPORATION MUST USE EVERY REASONABLE CARE IN PROPER CONSTRUCTION OF ITS ROAD, and in supplying it with necessary equipments, including properly constructed engines, and necessary and proper materials for its repair, and the selection of competent, skillful, and trusty subordinates. If these duties are performed with care and diligence by the directors, and one of the employees so employed is guilty of negligence, by which an injury occurs to another employee, the company is not responsible.

NOTICE TO DIRECTORS OF RAILROAD COMPANY THAT ENGINE IS OUT OF REPAIR AND UNSAFE for use is not of itself sufficient to render the company liable for injuries which may result from such defect to the em

ployees of the company. Where they have placed it in the hands of a competent and trustworthy master-machinist, and have furnished him with adequate materials and resources for the repair thereof, they must have notice that the engine is being used while unsafe and out of repair, or they will not be liable for injuries to a fireman employed by the company, occasioned by the explosion of the engine's boiler.

ACTION by Arnold, administrator of Scott, deceased, against appellant, the railroad company, for causing the death of his intestate, an employee of the company. The first paragraph of the complaint alleged that on February 5, 1860, deceased was ordered by the appellant, his master, to serve as fireman on engine No. 16, attached to an express passenger train, then running on said road between Indianapolis, Indiana, and Columbus, Ohio; that said engine "was old and rickety, with a weak, defective, patched-up, and leaky boiler," which was too weak to endure a high pressure of steam, and could not be used with safety in drawing a train of any kind; that its use on an express train, in such condition, involved great peril to the lives of both passengers and employees; that deceased did not know, and had no means of knowing, the weak and unsafe condition of said engine; that the appellant, with full knowledge thereof, carelessly and negligently caused the same to be used in drawing said train; and that on the same day the boiler of said engine exploded by reason of such defects, and caused the death of decedent, without any fault or negligence on his part. In the second paragraph it was alleged that the explosion of the boiler and death of Scott occurred in the state of Ohio. The law of that state was set out, and was substantially the same as the statute of Indiana on the subject of authorizing suits by administrators in such cases. A demurrer to each paragraph was overruled, and the ruling excepted to. An answer consisting of a general denial and several special paragraphs was then filed. Upon the trial, a verdict was given in favor of plaintiff for two thousand five hundred dollars. A motion for a new trial was overruled, and judgment was given upon the verdict. Other facts are stated in the opinion.

J. L. Ketcham and J. L. Mitchell, for the appellant.

J. T. Dys and A. C. Harris, for the appellee.

By Court, ELLIOTT, C. J. The first question in the case is presented by the demurrer to the complaint, which was overruled by the court. We think there was no error in that rul-

ing. The complaint alleges that the engine was old, and the boiler was so worn and defective that it was unsafe; and its use involved great peril to the lives of the employees, of which the appellant had full notice, though the deceased was ignorant thereof; and that the appellant, knowing the unsafe condition of the engine, negligently and carelessly caused it to be used in drawing the express train; that by reason of its defective and unsound condition, and without any fault of the deceased, the boiler exploded and caused his death.

A railroad company, occupying the relation of master in such cases, is bound to its servants and employees on its trains to use reasonable care in furnishing the road with proper and safe machinery, and in the employment of competent and skillful agents to superintend and keep it in proper repair.

The master is not responsible to an employee for an injury occasioned by the carelessness or negligence of a co-employee or fellow-servant. But here it is alleged that the appellant — the master — was notified of the unsafe condition of the engine, and negligently caused it to be used, whereby the fatal injury occurred. The negligent acts complained of are imputed to the master, and not to an employee; and if the allegations are true, the appellant is clearly responsible.

The question of the relation of co-employees to each other, and the duty and liability of the master to them, will be more fully discussed in a subsequent part of this opinion.

The evidence given on the trial is before us, and discloses the following facts, in reference to which there is no controversy: Thomas V. Losee was in the employ of the company, as master-machinist for the western division of the road, and had occupied that position at Indianapolis from 1863 until the time of the trial; and as such he had the immediate control, direction, and supervision of the engines and other machinery, and of the engineers and firemen on the engines on that division of the road. He selected the engine, engineer, and firemen for each particular service or train, and ordered them accordingly. He was a skillful and experienced master-machinist, and entirely competent to the proper performance of the duties required of him.

On the morning of the 5th of February, 1867, at Indianapolis, by Losee's direction, one Lederer was put in charge of engine No. 16, with Scott as fireman, in running an express passenger train between that place and Columbus, Ohio; and

on the same day, whilst so engaged, the boiler of the engine exploded, when in the state of Ohio, and caused the death of Scott. The explosion occurred in the fire-box. The engine was thrown some distance from the track, and its direction reversed. It was a Hinkley engine, built at the Boston Locomotive Works, and purchased by the company in 1852. It was a good engine, and had done valuable service.

A new fire-box was placed in it in 1862, which was repaired and put in good order about four or five months before the explosion. The engine, for some time previous, had been used mostly for freight purposes, though for three or four weeks immediately preceding the explosion it was used with a passenger train, and did good service.

Neither the engineer nor Scott had been in the employ of the appellant over about two months, and neither had served on engine No. 16 until the day of the explosion.

The instructions given by the court to the jury were excepted to by the appellant, and exceptions were also taken to the refusal of the court to give numerous instructions asked by the appellant.

A recovery was sought on the grounds that the engine was old, worn out, and unfit for service, and that its condition was known to Losee, or might have been known to him by a proper examination, which he failed to make, and carelessly and in neglect of his duty ordered it to be used in its unsafe condition, and thereby caused the death of Scott; that Losee, as master-machinist, was the representative of the appellant, and not, in a legal sense, a fellow-servant or co-employee with Scott; and that the appellant was, therefore, responsible in damages for the death of Scott, caused by Losee's negligence.

This theory is clearly sustained by the instructions of the court to the jury, and in the refusal to give any of the various instructions asked by the appellant maintaining a contrary doctrine. Thus the court instructed the jury as follows:—

"3. It was the duty of the defendant to see to it that the road was equipped with sufficient, suitable, and safe engines and machinery, and materials of the necessary quality, and men of the knowledge, skill, care, and capacity necessary for the well and faithful discharge of all the duties that appertain to the positions they severally occupied. For the faithful discharge of this obligation the defendant is holden to each and every person whom it employs in the business of running the road. And if you find from the evidence that

the defendant had knowledge, or in the exercise of due care might have known, that the engine in question was defective, insufficient, and unsafe for the service in which the same was employed, and the explosion which resulted in the death of Scott was caused by the defective and unsafe condition of the engine, *without the fault or negligence of the deceased or of the engineer contributing to the result*, in that case the plaintiff will be entitled to recover.

"4. The amount or degree of care which the defendant is bound to use, in order to see that her machinery and engines are in proper order and condition for the service required of them, should be proportioned to the risk and danger to life which would probably result from negligence and carelessness in this regard."

"7. If the engine had been recently overhauled by a competent and skillful machinist, *and he used due care and diligence* in putting her in repair, and put her upon the trip at the time of the accident *in a safe and good condition, capable of making the trip*, if used in a proper manner, but she was carelessly, negligently, or unskillfully used by the deceased or the engineer in charge, and the accident resulted from careless usage, in that case the plaintiff cannot recover."

One of the instructions asked by the appellant, which the court refused to give, is as follows:—

"15. The business of a railroad is, of necessity, conducted by a number and variety of agents and employees, and the condition and control of its machinery are also, of necessity, under the supervision of agents and employees; and when one accepts a situation on any given road, where he must necessarily be exposed to injury by any want of care or by the recklessness of a fellow-servant, he must be held to have entered such employment in view of such hazard, and he cannot recover for an injury resulting from the carelessness or recklessness of a fellow-servant, if the company has been prudent and careful in the selection of such fellow-servant, and especially if the fellow-servant through whose act or negligence the injury results is and had been a prudent, careful employee, and competent to the work placed under his care, although the particular act complained of may have been his gross negligence or recklessness."

The appellant also asked the court to instruct the jury as follows:—

"11. The defendant is not liable for injuries resulting from

latent defects in machinery, such as cannot be detected by the care and skill of those competent to test the sufficiency of the machinery on the road." The court refused, however, to give it as asked, but gave it after adding to it these qualifying words: "*If care and diligence is used in examining and inspecting the machinery.*"

This instruction was also moved by the appellant, viz.:—

"21. So far as concerns the employees of railroad companies, there is no implied warranty of life or guaranty against injury; but the employee takes his place subject to all the dangers incident to the position. The company is only bound to furnish competent and careful employees to keep her machinery in repair and safe condition, so far as she can, by competent and careful workmen; and if you believe from the evidence that she did it in this case, the plaintiff cannot recover, though the deceased came to his death by the explosion complained of." This the court refused, but in lieu thereof instructed thus: "So far as concerns the employees of railroad companies, there is no implied warranty of life or guaranty against injury, but the employee takes his place subject to all the dangers incident to the position. The company is only bound to furnish competent and careful employees to keep her machinery in repair and safe condition, so far as she can, by competent and careful workmen, *using during care to see that her machinery is in good and safe repair*; and if you believe from the evidence *that she did use such care in this case*, the plaintiff cannot recover, though the deceased came to his death by the explosion complained of."

The instruction, as asked, claims that the appellant was not responsible if the employees having the care and management of the machinery, and of its repairs and condition, were competent and careful in the discharge of their duties, although the decedent came to his death by the carelessness of such co-employees. But by the modification made by the court, which we have italicized, an entirely different principle is asserted. The instruction as given, in effect, said to the jury, that the appellant was bound to see to it that the machinery of the road was kept in proper order, and if the engine was in an unsafe condition, and was thus used by order of the master-machinist, and if the explosion resulted from the unsafe condition of the engine, the appellant was responsible, notwithstanding the master-machinist was competent and careful, and worthy to be trusted in his position.

It is a well-settled principle of the law that the employer or master is not liable for injuries suffered by one employee solely through the carelessness or negligence of another employee of the same master engaged in the same general business.

Each employee engaged with others in the service of a common master takes upon himself the liability to injury resulting from the negligence of his co-employees. The hazard is incident to the nature of the employment into which he enters, and in respect to which the master is not an insurer, in the absence of an express contract to that effect. Nor is the master liable by the fact that the employee receiving the injury is inferior in grade of employment to the party by whose negligence the injury is caused, if both are employed in the same general business, or in other words, "if the services of each in his particular sphere or department are directed to the accomplishment of the same general end": *Warner v. Erie R'y Co.*, recently decided by the court of appeals of New York, and reported in 39 N. Y. 468; *Priestly v. Fowler*, 3 Mees. & W. 1; *Coon v. Utica etc. R. R. Co.*, 5 Id. 492; *Albro v. Agawam Canal Co.*, 6 Cush. 75.

In *Gillenwater v. Madison etc. R. R. Co.*, 5 Ind. 339 [61 Am. Dec. 101], and *Fitzpatrick v. New Albany etc. R. R. Co.*, 7 Id. 436, it was held that a railroad company is liable to a servant for an injury occasioned by the negligence of other servants of the company, where the duties of the latter, in connection with which the injury happens, are not common or in the same department with those of the injured servant, and where the negligence of the latter has not contributed to produce the injury. But this limitation of the exemption of the company from liability in such cases is not recognized in any of the subsequent cases; and it is now settled in this state that the employer is not liable for an injury to one employee, occasioned by the negligence of another engaged in the same general undertaking: *Ohio etc. R. R. Co. v. Tindall*, 13 Ind. 366 [74 Am. Dec. 259]; *Wilson v. Madison etc. R. R. Co.*, 18 Id. 228; *Slattery v. Toledo etc. R'y Co.*, 23 Id. 81; *Ohio etc. R. R. Co. v. Hammersley*, 28 Id. 371. In *Slattery v. Toledo etc. R. R. Co.*, *supra*, Worden, J., quotes with approbation from the decision in *Wright v. New York Central R. R. Co.*, 25 N. Y. 562, as follows: "Neither is it necessary, in order to bring a case within the general rule of exemption, that the servants, the one that suffers and the one that causes the injury, should be at the

time engaged in the same operation or particular work. It is enough that they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties and services tending to accomplish the same general purposes, as in maintaining and operating a railroad, operating a factory, working a mine, or erecting a building. The question is whether they are under the same general control."

To the same effect is the case of *Manville v. Cleveland etc. R. R. Co.*, 11 Ohio St. 417, where it is said that "those employed in facilitating the running of the trains, by ballasting the track, removing obstructions, and those employed at stations, attending to switches, and other duties of a like nature upon the road, as well as those upon the trains, operating, may all be well regarded as fellow-servants in the common service."

In the case at bar, Losee, as master-machinist, had the immediate charge, control, and direction of the machinery, and of its repairs, as well as the control and direction of the engineers and firemen on the trains.

He and the deceased were both employees of the appellant, engaged in the same general undertaking, operating the road, — indeed, in the same department, the one serving under the immediate direction and control of the other. They were fellow-servants, and the appellant is not responsible for an injury to the one caused by the negligence of the other.

But it is insisted that the appellant was bound to the employees to furnish the road with sound and safe machinery, and to keep it in safe repair and condition, and if the explosion of the boiler and the death of the deceased were caused by the use of the engine when in an unsafe condition, the fault is attributable to the appellant, and the plaintiff is entitled to recover. We do not think this position is sound in principle, or sustained by the weight of authority, though cases may be found to support it.

The board of directors of a railroad company are its immediate representatives, and occupy the relation of master to the various employees engaged in operating the road and superintending and performing the business of the company in its various departments. When an injury results to a passenger on a train, or to a stranger, from the negligence or carelessness of an employee in the discharge of the duties devolving upon him, the principle of *respondet superior* applies, and the

company is responsible in damages; but this principle does not apply as between the company and its employees, and in such cases the company can only be held responsible to the employee where the injury is caused by the negligence or failure of the board of directors to perform some duty devolved upon them by express contract with the employee, or which is implied from the duties devolving upon them in their relation of master to the employee. The directors of such a corporation, from the very nature of the organization and the business in which it is engaged, are not expected personally to superintend the various operations of the road. There is no implied obligation that they should do so; nor is it to be presumed that they are selected with a view to their qualifications and skill for the performance of many of the duties required in constructing, equipping, and operating the road. The master is not liable to his servant, unless there be negligence on the part of the master in that which the master has contracted or undertaken, either expressly or impliedly, to do.

It is the duty of such a corporation to use every reasonable care in the proper construction of its road, and in supplying it with the necessary equipment, including properly constructed engines, and the necessary and proper materials for its repair, and the selection of competent, skillful, and trusty subordinates to supervise, inspect, repair, and regulate the machinery, and to regulate and control the operations of the road. If these duties are performed with care and diligence by the directors, and one of the persons so employed is guilty of negligence by which an injury occurs to another, it is not the negligence of the directors, or master, and the company is not responsible. This position is sustained by the rulings of this court in *Chicago etc. R. R. Co. v. Harney*, 28 Ind. 28 [92 Am. Dec. 282], and *Ohio etc. R. R. Co. v. Hammersley*, 28 Id. 371.

In the case of *Warner v. Erie R'y Co.*, 39 N. Y. 468, the action was brought to recover damages arising from a personal injury which resulted in the death of one of the defendant's employees, a baggageman, on a train which was precipitated into a stream by the falling of a bridge. The jury found that the bridge fell from decay in its timbers. The bridge was properly constructed, and was originally of sufficient strength for the purposes for which it was intended. It was held that the company was not liable, in the absence of proof that the

directors of the company had notice of the unsafe condition of the bridge.

The case of *Wilson v. Merry*, decided in the English house of lords, in May, 1865, and reported in L. R. 3 App. 326, is said to be a very instructive case on this subject. The report containing the case is not in our reach, but we find a somewhat comprehensive notice of it in *Warner v. Erie R'y Co.*, *supra*, the substance of which is as follows:—

It was a Scotch appeal in a case where a verdict had been recovered against the proprietors of a coal mine, for the death of a party occasioned, as was alleged, by the defective construction of a scaffold in the mine. "The case turned upon the liability of the master for an injury to his employee, where the master did not personally superintend the work, but devolved it upon a suitable mechanic or foreman, superior in grade to the injured employee. Opinions were given by the lord chancellor, Lord Cairns, and by the ex-chancellors, Lord Cranworth and Lord Chelmsford, all substantially concurring in the conclusion that the duty of the master was to select proper and competent persons to do the work, and furnish them with adequate materials and resources for its accomplishment; and when he had done that, he had performed his whole duty. In the course of his opinion, Lord Cairns says: 'The master is not and cannot be liable to his servant, unless there be negligence on the part of the master, in that which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business, but to select proper and competent persons to do so, and furnish them with adequate materials and resources for the work.' He adds: 'If the persons so selected are guilty of negligence, this is not any negligence of the master; and if an accident occurs to a workman to-day, in consequence of the negligence of another workman, skillful and competent, who was formerly but is no longer in the employment of the master, the master is not liable, although the two cannot technically be described as fellow-workmen; negligence cannot exist, if the master does his best to supply competent persons. He cannot warrant the competency of his servants'": See also *Wright v. New York Central R. R. Co.*, 25 N. Y. 562.

One of the cases cited by the appellee, and much relied on to sustain the rulings of the court below, is that of *Warner v. Erie R'y Co.*, 49 Barb. 558, in the supreme court of New York;

but that case, as we have seen, was subsequently reversed by the court of appeals, on the very point to which it is cited as authority: 39 N. Y. 468.

Here the evidence conclusively shows that Losee was skillful and competent, and that the shop of the appellant at Indianapolis was furnished with all the necessary appliances, and with adequate materials and resources, and skillful workmen to keep the machinery in repair.

Notice to the directors of the company that the engine was out of repair and unsafe for use would not of itself be sufficient to render the company liable. Such machinery is often liable to get out of repair and become unsafe. The directors did not, in person, superintend its repairs or direct its use, but devolved these duties on a skillful, competent, and trustworthy master-machinist, and furnished him with adequate materials and resources for its repair. They did not direct or authorize its use when in an unsafe condition, and are not responsible for its use in that condition, in the absence of notice that it was being so used. But there was no evidence even tending to prove that the directors of the company had any notice that the engine was in an unsafe condition, or that it was being so used.

We have discussed the questions involved in the case on the hypothesis that the engine was defective and unsafe, and was carelessly put into the service in that condition by Losee, and that the explosion was caused by the defective condition of the engine, and without any fault or negligence on the part of the deceased, or of the engineer in charge; but we are by no means satisfied that the evidence justifies such a conclusion. It was a rule of the service, that when an engine was out of repair, rendering it unsafe or unfit for the service required, the engineer in charge should report the fact promptly to the master-machinist. No such report was made as to engine No. 16, nor was there any evidence that the master-machinist had any notice in fact that it was in an unsafe condition or needed repairs; whilst the engineer who had been in charge of and daily used it for months, and up to the day on which the deceased was placed on it as fireman, testified that it was a good machine, in a safe condition, and in good repair the day before the accident. The only evidence to the contrary was that of the engineer in charge of it on the day of the explosion, who testified that the boiler was leaking at the flues, in the flue-sheet; but the explosion is not ascribed to that cause. He

further testified that the explosion occurred in the fire-box, and without any fault on his part or that of the deceased. When asked if he knew whether the fire-box and crown-sheet were old or new, he answered that he did not know, and could not tell from outside appearances; that it was impossible to tell, when it was coated over with lime on the inside; that "it might very often look very well on the outside, while it was all rotten on the inside." He was also asked what was the cause of the explosion, to the best of his knowledge and judgment; to which he answered: "The deficiency of the fire-box, as far as I know. It was old and worn out." His leg was broken by the explosion, and he did not examine the fire-box afterwards. He had never run the engine until that day, and had no previous knowledge of it; and when it is remembered that he had just previously testified that he did not know whether the fire-box was old or new, and could not tell from outside appearances,—the only view he ever had of it,—his opinion as to the cause of the explosion is entitled to but little weight. On the other hand, the nature of the explosion and the evidence of witnesses of skill and experience very strongly indicate that the water was suffered to get too low in the boiler, in consequence of which—the steam being shut off for a time, when on a down grade—the water sank below the crown-sheet of the fire-box, which became highly heated, and when the steam was let on the water rose upon the crown-sheet, in its heated condition, and thereby caused the explosion. But we need not discuss the evidence on this point. The court erred in the instructions to the jury as already indicated, and in refusing to give instructions 11, 15, and 21, as asked by the appellant, and a new trial should therefore have been granted.

Judgment reversed, with costs; and the cause remanded for a new trial and further proceedings not inconsistent with this opinion.

MASTER'S LIABILITY FOR INJURY TO SERVANT FROM FELLOW-SERVANT'S NEGLIGENCE: See *Gilman v. Eastern R. R. Corp.*, 87 Am. Dec. 635, collected cases in note thereto 640; *Snow v. Housatonic R. R. Co.*, 85 Id. 720, voluminous note thereto 730; note to *O'Connell v. Baltimore etc. R. R. Co.*, 83 Id. 553; note to *Ryan v. Fowler*, 82 Id. 321; *Brackett v. Lubbee*, 81 Id. 694, note 696.

DUTY OF RAILROAD COMPANY TO PROVIDE PROPER SERVANTS, MACHINERY, AND APPLIANCES, AND LIABILITY TO SERVANT FOR INJURIES happening to him through insufficient or defective machinery, or through incompetent fellow-servants: See *Illinois Cent. R. R. Co. v. Jewell*, 92 Am. Dec. 240, note 242; *Chicago etc. R'y Co. v. Harney*, 92 Id. 282, note 286; extended note to

Chicago etc. R. R. Co. v. Swett, 92 Id. 213-221, discussing an employer's duty to provide safe machinery and appliances; *Baltimore etc. R. R. Co. v. State*, 96 Id. 528; *Gilman v. Eastern R. R. Co.*, 90 Id. 210; notes to *Gilman v. Eastern R. R. Co.*, 87 Id. 639; *Thayer v. St. Louis etc. R. R. Co.*, 85 Id. 409; *Snow v. Housatonic R. R. Co.*, 85 Id. 720; note to *Ryan v. Fowler*, 82 Id. 321.

AS TO WHO ARE FELLOW-SERVANTS ENGAGED IN COMMON EMPLOYMENT: See cases cited in note to *Chicago etc. R'y Co. v. Harney*, 92 Am. Dec. 286; extended note to *Fox v. Sandford*, 67 Id. 588-597, where the subject is discussed.

THE PRINCIPAL CASE WAS CITED IN each of the following authorities, and to the point stated: The board of directors of a corporation are practically the corporation itself, so far at least as its relations to the public are concerned: *Louisville etc. R'y Co. v. McVay*, 98 Ind. 393. That an instruction assumes the truth of a fact which is admitted, or not disputed, is no objection to it, and the supreme court, when the evidence is not in the record, will presume that facts so assumed were admitted or conclusively proved: *Drinkout v. Eagle Machine Works*, 90 Id. 425. The employer's obligation is not to supply the employee with absolutely safe machinery, or with any particular kind of machinery, but to use ordinary and reasonable care not to subject the employee to unnecessary or unreasonable danger. He need not throw away his implements or machinery upon the discovery of every new invention claimed to be better than the one in use; but he must exercise ordinary care and prudence in keeping his implements or machinery in sound repair. If so, he will not be responsible to servants for injuries received in their use: See *Lake Shore etc. R'y Co. v. McCormick*, 74 Id. 446, and numerous cases there cited. In the absence of express contract to that effect, the master is not liable for injuries suffered by one of his employees solely through the negligence of another of his employees, engaged in the same general business. Nor is the master rendered liable by the fact, if it be the fact, that the injured employee is inferior in grade of employment to the one through whose negligence the injury is caused, if the services of each in his particular sphere are directed to the accomplishment of the same general end: *Brazil etc. Coal Co. v. Cain*, 98 Id. 286; *Gormley v. Ohio etc. R'y Co.*, 72 Id. 33; *Sullivan v. Toledo etc. R'y Co.*, 58 Id. 28; *Lake Shore etc. R'y Co. v. Stupak*, 108 Id. 4; *Indiana etc. R'y Co. v. Dailey*, 110 Id. 79; *Indiana Car Co. v. Parker*, 100 Id. 183. A foreman is a fellow-servant of those working with him: See case last cited. The master is not liable for injuries suffered by a servant through the negligence of a fellow-servant, unless the master was negligent in the selection of the servant in fault: *Hogan v. Central Pacific R. R. Co.*, 49 Cal. 130. But in the latter case he would be liable, or in case he retains an incompetent or unfit servant in service: *Pennsylvania Co. v. Dean*, 92 Ind. 462; *Nordyke etc. Co. v. Van Sant*, 99 Id. 190. But if the master be not present, and conducts a business by a superintendent, who employs and discharges the laborers and employees, such superintendent is not a fellow-servant; he represents the master. The owner of mills and machinery, which men are employed to operate, owes duties to the employees, which he cannot escape by absenting himself and committing the entire charge to an agent. Such agent, in respect to the duty of providing safe machinery, represents the master: *Mitchell v. Robinson*, 80 Id. 284.

STUDABAKER v. WHITE.

[31 INDIANA, 211.]

PENALTY OF BOND WILL BE TREATED AS LIQUIDATED DAMAGES, upon a breach of the bond, if the agreement therein is to do, or abstain from doing, an act, and the damages are such that they cannot be estimated with certainty.

BOND FOR ONE THOUSAND DOLLARS, CONDITIONED THAT OBLIGOR SHALL NOT ENGAGE IN LIQUOR TRAFFIC within a county named, after a specified date, is valid in Indiana.

THE facts are stated in the opinion.

L. M. Ninde, R. S. Taylor, and Robertson, for the appellants.

D. Studabaker, for the appellee.

By Court, RAY, J. Action by the appellants for breach of a bond executed by the appellee.

The condition of the bond is, "that J. G. White is to sell no more spirituous or malt liquors or wine within the county of Wells, state of Indiana, after the fourth day of March, 1859, nor cause the same to be sold within the said county, either directly or indirectly, after the said time specified. And the said White is further bound to neither manufacture or obtain any spirituous or malt liquors or wine, or cause to be sold in said county aforesaid by himself or any other person, either directly or indirectly, after the fourth day of March, 1859. The said J. G. White is further bound to settle a certain obligation calling for liquors payable to Joseph Richey, of the sum of \$177.57, so that the whisky or liquor is not to be brought to the town of Bluffton, of the county of Wells, state of Indiana; and further, to use his influence to prevent any person or persons from bringing any of the aforesaid liquors to the aforesaid town with the intention of selling the same within the town aforesaid."

The sum named in the bond is one thousand dollars. The breach charged is selling spirituous liquors within the town. No special damages are alleged.

The appellee filed a second paragraph of answer, averring that only nominal damages had been sustained. A demurrer was overruled to this paragraph.

On the trial, the court instructed the jury that if White "failed to settle the obligation referred to," it would be a breach of the bond; and that as no special damages had been proved, the recovery could not exceed a nominal sum.

We assume the statement, that a failure to settle the obligation would be a breach of a condition of the bond, to have been an inadvertent use of words, as the stipulation is very plain that the obligation is to be so settled that the liquor will not be brought to the town of Bluffton. We suppose his failure to deliver any liquor in fulfillment of his contract would comply with his bond to the appellants. The validity of a bond like this has been heretofore decided: *Harrison v. Leckhart*, 25 Ind. 112.

Were the damages in this contract liquidated, or in the nature of a penalty?

It is insisted that the violation of the condition that White will "use his influence to prevent any person from bringing any of the aforesaid liquors to the town aforesaid, with the intention of selling the same within the town," would result in much less injury than a breach of other conditions, and therefore a single sum could not have been intended as the stipulated amount in either case.

In *Galsworthy v. Strutt*, 1 Ex. 658, covenant on an indenture for the dissolution of copartnership between the plaintiff and defendant as attorneys and solicitors, Strutt promised and agreed that he shall not, nor will at any time or times hereafter, within the next seven years, directly or indirectly, either by himself or in copartnership with another or others, carry on the said practice, profession, or business of an attorney or solicitor within the distance of fifty miles from, etc., nor interfere with, solicit, or influence the clients of the said late copartnership. The sum of one thousand pounds was fixed as "liquidated damages" for a breach of the covenant. Breach assigned, practicing as an attorney within fifty miles, etc.

Parke, B., said: "I take it to be clear that, upon the true construction of this covenant, the defendant would not be bound to pay more than one thousand pounds,—that is, in case he should violate either of those two or three matters mentioned in the covenant. These matters are each of them incapable of exact estimation. It cannot be said what damage a person may sustain by another setting up in business within a limited period of time or distance, nor how much he may be injured by the loss of one of his clients. The loss may be either great or small; and therefore, in order to avoid all dispute, the parties are content to fix a certain sum, namely, the sum they have mentioned in express terms in their agreement. Now, it is perfectly competent to parties to make a stipulation

to pay a fixed sum for the breach of a covenant, the damage arising from which it is extremely difficult to ascertain; and I think it is not an unreasonable stipulation which the defendant has made, that he should pay one thousand pounds upon the event of either of the matters mentioned in this agreement."

Alderson, B., inquired: "Where the damage cannot be ascertained, what absurdity is there in a party saying there shall be a fixed sum? and therefore in such case the courts may give the words their plain and ordinary meaning. The amount of damage which a person might sustain by another's practicing within fifty miles for the period of seven years would not be the same in amount as if he were to practice within forty miles, or next door, nor the same if he had set up in business the first, second, or sixth year. In one case the damages might be small, and in the other large; but the parties have agreed to a certain fixed sum."

Had the appellants' counsel favored us with a reference to this case, its aptness would have induced a suspicion that the agreement therein used had served as a text for the conditions of the bond in judgment.

The rule in the construction of these contracts is, that if the agreement consist of one or more stipulations, the breach of which cannot be measured, then the contract must be taken to have meant that the sum agreed on was to be liquidated damages, and not a penalty: *Mayne on Damages*, 67; *Parke, B.*, in *Atkyns v. Kinnier*, 4 Ex. 776; *Cotheal v. Talmage*, 9 N. Y. 551 [61 Am. Dec. 716]; *Grasselli v. Lowdon*, 11 Ohio St. 349; *Sedgwick on Damages*, 4th ed., 472; *Hamilton v. Overton*, 6 Blackf. 206 [38 Am. Dec. 136]; *Duffy v. Shockey*, 11 Ind. 70 [71 Am. Dec. 348].

Where the covenant is for the abstaining from doing some particular act or acts, or for their performance, which are not measurable by any exact pecuniary standard, and it is agreed that the party covenanting shall pay a stipulated sum for a violation of any of such covenants, that sum is to be deemed liquidated damages, and not a penalty: *Bagley v. Peddis*. 5 Sand. 192.

The sum named in this case is to be regarded as liquidated damages, and any violation within the plain intent and purpose of the contract authorized such recovery. The instruction was erroneous.

The demurrer should have been sustained to the second

paragraph of the answer. The non-performance of the covenant imports damage: *Atkins v. Kinnier, supra*.

Judgment reversed, with costs, and the cause remanded for a new trial.

SUM NAMED AS "PENALTY" MAY BE REGARDED AS LIQUIDATED DAMAGES, where the actual damage is uncertain, and difficult to ascertain: *Duffy v. Shockey*, 71 Am. Dec. 348; *Hamilton v. Overton*, 38 Id. 136, note 138.

CONTRACTS IN RESTRAINT OF TRADE, VALIDITY OF: See note to *Wright v. Ryder*, 95 Am. Dec. 193; *Keeler v. Taylor*, 91 Id. 221, note 224; *Chicago v. Rumpff*, 92 Id. 196; extended note to *Angier v. Webber*, 92 Id. 751-765, fully discussing the subject, and citing the principal case at page 758.

WHEN SUM NAMED IN CONTRACT IS TO BE DEEMED PENALTY, AND WHEN LIQUIDATED DAMAGES: See *Duffy v. Shockey*, 71 Am. Dec. 347, collected cases in note thereto 353; note to *Nash v. Hermosilla*, 70 Id. 678; *Bagley v. Peddie*, 69 Id. 713, note 718; note to *Curry v. Larer*, 49 Id. 489; extended note to *Graham v. Bickham*, 1 Id. 331-340.

THE PRINCIPAL CASE WAS CITED IN each of the following authorities, and to the point stated: Where the parties to a contract in restraint of trade designate a specific sum as damages, to be recovered by one, if the other violates his contract, as in opening a rival business at a particular stand, or engaging in the same business within a certain length of time, the amount so provided for is not a penalty, but constitutes liquidated damages: *Johnson v. Gwinn*, 100 Ind. 473; *Spicer v. Hoop*, 51 Id. 368; and it is not necessary for the plaintiff to show in what manner, or to what extent, he has been damaged, or to allege special damages: See same cases

SUTTON v. JERVIS.

[81 INDIANA, 265.]

VOLUNTARY REDELIVERY, DESTRUCTION, OR CANCELLATION OF DEED CANNOT UNDER ANY CIRCUMSTANCES REINVEST the grantor with title to the premises conveyed by said deed, as against the acquired rights of a third person under such deed. This principle was applied to the following facts: A took a deed to land. It was not recorded, and was lost or destroyed. With A's consent, another deed was made to his son. A and son executed a mortgage in which A's wife did not join. A and his son died, leaving the mortgage unpaid. The mortgagee sought to foreclose. *Held*, that A's wife was entitled to one third of the land.

EQUITY WILL NOT PERMIT PERSON, AS AGAINST INNOCENT PURCHASER, TO ASSERT RIGHTS BY PAROL EVIDENCE under a deed voluntarily redelivered to the grantor, destroyed or canceled.

POSSESSION OF LAND TAKEN UNDER UNRECORDED DEED IS NOTICE TO THIRD PERSONS of the existence of such deed.

THE facts are stated in the opinion.

W. F. Pidgeon, for the appellant.

W. E. Niblack and W. H. De Wolf, for the appellee.

By Court, RAY, J. The appellee filed his complaint to foreclose a mortgage, making the appellant, Mary Sutton, a defendant, alleging that she was the widow of Ebenezer Sutton, deceased, and the mother of Simon Sutton, deceased. Other heirs were made parties defendants.

The complaint charged that said Ebenezer and Simon had executed and delivered a mortgage on certain described property, to secure certain debts to the appellee; that said Ebenezer had no interest in the land so mortgaged, but the same was the sole property of said Simon; and that the debts secured thereby were due and unpaid.

The appellant answered that she and her husband occupied the land described in the mortgage up to the date of his death, and she still resided upon the same; that the title had been conveyed to her husband, and she had never joined in any conveyance or encumbrance of the property, and she was therefore entitled to one third thereof in fee; and she asked that the same be set off to her.

Reply, that the sole title to the land was in the heirs of said Simon, and that Ebenezer never owned said land or had any interest in the same. A denial was also filed.

A motion was overruled to strike out the special paragraph of the reply. It should have been stricken out. The answer itself amounted to nothing more than a denial of the allegation in the complaint, that the entire title to the property mortgaged was in Simon Sutton; and the reply simply reaffirms this averment. But the error is harmless.

On the trial of the cause, the appellant proved by one Myers that he was the former owner of the property, and as such owner had, some eight years before, sold the same to Ebenezer Sutton for the sum of one thousand dollars, and received from him two payments of about five hundred dollars; that said Ebenezer had taken possession of said land, built a residence, and resided therein with his family; that he had cleared and farmed some sixty or seventy acres of the land; that some three years after such purchase, Myers had executed a deed of said land, which was duly acknowledged and delivered to Ebenezer; that the deed was afterwards lost, misplaced, or destroyed by said Ebenezer, without having been recorded, and with the consent of Ebenezer, Myers had executed another deed to Simon, the son of the appellant and said Ebenezer; that the appellant, her husband, and son, at the date of the purchase, were all living together as one family, and possessed

and cultivated the land up to the date of the death of said Simon and Ebenezer; and the appellant with the heirs of said Simon had continued to reside upon the same. The appellee then proved by said Myers that Ebenezer had said that the deed to him "was of no account."

Upon this evidence, the court found that the appellant had no interest in the land, and entered a decree for the sale of the property under the mortgage.

The only ground upon which it can be contended that this finding should be sustained is, that the fact that Ebenezer Sutton lost, misplaced, or destroyed the deed conveying the property to him, and afterwards verbally consented that Myers should execute a conveyance to his son, estops the appellant from proving such a conveyance of the land to Ebenezer: *Speer v. Speer*, 7 Ind. 178 [63 Am. Dec. 418]; *Thompson v. Thompson*, 9 Id. 323 [68 Am. Dec. 638]; *Bank of Newbury v. Eastman*, 44 N. H. 431; *Parker v. Kane*, 4 Wis. 1 [65 Am. Dec. 283].

The voluntary redelivery, destruction, or canceling of the deed could, under no circumstances, reinvest the title in Myers: *Holbrook v. Tirrell*, 9 Pick. 105; *Botsford v. Morehouse*, 4 Conn. 550; *Gilbert v. Bulkley*, 5 Id. 262 [13 Am. Dec. 57]; *Nason v. Grant*, 21 Me. 160; *Patterson v. Yeaton*, 47 Id. 308. But equity would not permit Ebenezer Sutton, as against a purchaser for value, to introduce parol evidence of the contents of the instrument so destroyed. He could not, after voluntarily depriving himself of the best evidence, introduce evidence of a lower grade. But this rule would not be applied, as against the rights of a third party having acquired any interest in the land: *Nason v. Grant*, *supra*, and authorities there cited. In *Wilson v. Hill*, 13 N. J. Eq. 143, it was held that the title to lands vested in a married woman by an unrecorded deed cannot be divested by her parol consent that such deed may be canceled, and a conveyance made by her grantor to her husband.

Our statute gives the surviving wife one third of all the real estate of which her husband may have been seised in fee-simple at any time during the marriage, and in the conveyance of which she may not have joined in due form of law: 1 Gavin and Hord, 296, sec. 27. Certainly, the husband of the appellant was seised in fee-simple of the land during the marriage, and the wife united in no conveyance of the title.

But the evidence does not show that there was any volun-

tary destruction of the deed by Ebenezer. He had received the title, entered upon the land, improved it, and at the date of the mortgage by Simon, the mortgagee, Jervis, was bound to take notice of such continued possession, not by his mortgagor, but by Ebenezer, in whom the legal title had vested.

There is nothing in the proof which could in any way deprive the appellant of her right to one third of the property in question.

The cause is reversed as to the appellant, and remanded for a new trial. Costs.

CANCELLATION, DESTRUCTION, ALTERATION, OR REDELIVERY OF DEED will not of itself revert title in grantor: See *Lawton v. Gordon*, 91 Am. Dec. 670, collected cases in note thereto 672; note to *Alexander v. Hickox*, 86 Id. 120.

NOTICE OF PRIOR, UNRECORDED DEED: See *Morrison v. Kelly*, 74 Am. Dec. 169, note 178, showing effect of possession as notice: *Galland v. Jackman*, 85 Id. 172, note 177.

CITATION OF PRINCIPAL CASE: See *Brannon v. May*, 42 Ind. 98.

STEVENS v. STATE.

[81 INDIANA, 485.]

MONOMANIAC ON ANY SUBJECT IS NOT GUILTY OF ANY CRIME, where he does an act criminal in nature, while under the influence of an insane impulse which controls his will and judgment.

INSANITY—PERSON IS NOT GUILTY OF ANY CRIME THOUGH HE KILLS HUMAN BEING, if such killing is the offspring or product of mental disease in the slayer, of such a nature that he has not the power to adhere to the right, nor to avoid the wrong.

UN SOUNDNESS OF MIND IS QUESTION OF FACT TO BE DETERMINED BY JURY, in criminal cases, as other facts are found.

The facts are stated in the opinion.

J. P. Baird, C. Cruft, W. E. McLean, and J. N. Pierce, for the appellant.

R. W. Thompson and D. E. Williamson, attorney-general, for the state.

By Court, GREGORY, J. The appellant was indicted in the court below for murder in the first degree. He pleaded "not guilty," and was tried by jury; verdict guilty affixing the death penalty.

The defense was insanity. The evidence as to insanity was slight, but sufficient to carry the question to the jury. The

motion for a new trial was based upon alleged errors of law occurring at the trial, in the instructions of the court to the jury.

At the instance of the prosecuting attorney, the court instructed the jury that, "in order to excuse a man for killing another on the ground of insanity, it must appear to the satisfaction of the jury that he was either absolutely insane at the time of the act, so that he did not know the difference between right and wrong, or that he was laboring under some form of monomania by which he was irresistibly impelled, by an uncontrollable will, to the perpetration of the act; *but such monomania must be in relation to the act of killing; for if it is monomania upon some other subject, it does not excuse a killing.*

"If a man becomes a monomaniac on account of the morbid state of his domestic affections, or if he becomes so on account of the morbid state of his religious feelings, in either case his moral sense is only affected by the cause of his disease; that is, he is only excused from the commission of crime so far as he acts under the irresistible influence of the particular monomania under which he is laboring; *and if, although laboring under either of said forms of monomania, he shall kill a man with premeditation, malice, and purpose, he would be without excuse, and would be guilty of murder in the first degree.*

"In order to excuse a man for the commission of a crime on the ground of monomania, *it must appear that the monomania had relation to the particular crime committed; and if it was monomania upon any other subject, it would be no excuse.*

"When a man kills another *without having given any previous indications of insanity*, and afterwards so acts as to appear to be insane, the jury should consider this fact, to determine whether insanity is not simulated or pretended, and if they find that it was pretended, it should not weigh anything in their decision of the question of guilt or innocence."

It is claimed that the parts of these instructions italicized are erroneous.

At the request of the defendant, the jury were instructed, that "if they believed from the evidence that when the prisoner committed the act charged in the indictment he was laboring under any irresistible and uncontrollable mental delusion, impelling him to do said act; that he was at the time of the perpetration of said killing in such a state of mind as to be unable to control his will and his actions in regard to the act so committed. — then in judgment of law, he

was insane, and could not be guilty of the offense of murder charged in the indictment; and he is consequently entitled to a verdict of not guilty.

"If the jury believe from the evidence that, at the time of committing the act charged in the indictment, the prisoner was moved thereto by an insane impulse, controlling his will and his judgment,—an impulse too powerful for him to resist; and said insane impulse arose from causes physical or moral, or from both combined, not voluntarily induced by himself,—under such circumstances, the jury cannot find the defendant guilty as charged."

The defendant asked, at the proper time, the following instruction: That "if the jury entertain a reasonable doubt as to the soundness of the mind of the prisoner at the time of the commission of the homicide charged, he is entitled to the benefit of that doubt, as he would be to the benefit of a doubt as to any other material fact in the case, it being, under the statute of this state, a necessary ingredient of the offense that the person charged shall, at the time of the commission of the offense, be of sound mind; and if the evidence shows that the prisoner, at the time of the commission of the act, was not of such sound mind, although the jury may believe he had judgment and reason sufficient to discriminate between right and wrong in the ordinary affairs of life, even at the time of the commission of the offense,—they cannot find him guilty." The court refused to give the instruction as asked, but, over the objection of the defendant, gave it with this qualification: "If the jury believe from the evidence that the defendant knew the difference between right and wrong in respect to the act in question; if he was conscious that such act was one which he ought not to do; and if that act was at the same time contrary to the law of the state,—then he is responsible for his acts."

It is undoubtedly the law, as charged by the court below, that if the defendant was moved to the act by an insane impulse controlling his will and his judgment, then he was not guilty of the crime charged. And if the defendant was a monomaniac on any subject, it was wholly immaterial upon what subject, so that the insane impulse led to the commission of the act.

It is claimed that the instructions as to this point given by the court at the instance of the state's attorney were calculated to mislead the jury, and two members of this court are

of that opinion. It is clear that the instructions might have been put in better form, but I have no doubt that they are correct law, as they were intended by the court to be understood, and particularly as explained by the court in the instructions asked by the defendant. But if this case turned upon that question, I should hesitate to determine that a jury might not have been misled by instructions about the meaning of which there is a difference of opinion among the members of this court.

It is claimed that the court erred in the instruction in reference to simulating insanity after the commission of the act, in assuming that the defendant had given no previous indications of insanity. There was some evidence of previous indications of insanity, but we do not understand the instruction as making any such assumption. The instruction may not have been applicable to the case made, and may have misled the jury.

But we are clear that the court below erred in giving the qualification to the instruction asked by the defendant.

The statute provides that "if any person of sound mind shall purposely, and with premeditated malice, kill any human being, such person shall be deemed guilty of murder in the first degree": 2 Gavin and Hord, p. 435, sec. 2.

The legislature have defined the meaning of the expression, "persons of unsound mind." It is provided that this phrase "shall be taken to mean any idiot, *non compos*, lunatic, monomaniac, or distracted person": 2 Gavin and Hord, pp. 573, 574, sec. 1.

The great difficulty has been, in cases of partial insanity, to fix the standard of criminal responsibility. The leading case in this country is *Commonwealth v. Rogers*, 7 Met. 500 [41 Am. Dec. 458]. Chief Justice Shaw, in his charge to the jury in that case, said: "The difficulty lies between these extremes, in the cases of partial insanity, where the mind may be clouded and weakened, but not incapable of remembering, reasoning, and judging, or so perverted by insane delusion as to act under false impressions and influences. In these cases, the rule of law, as we understand it, is this: A man is not to be excused from responsibility if he has capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act he is then doing,—a knowledge and consciousness that the act he is doing is wrong and criminal, and will subject him to punishment. In order to be re-

sponsible, he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty. On the contrary, although he may be laboring under partial insanity, if he still understands the nature and character of his act, and its consequences,—if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that, if he does the act, he will do wrong, and receive punishment,—such partial insanity is not sufficient to exempt him from responsibility from criminal acts.”

As we understand this charge, it does not go to the length of fixing the test of “a knowledge of right and wrong”; it recognizes the necessity of a mental power sufficient to apply that knowledge and act accordingly. The charge is by no means clear, and we think that it is not entitled to the weight usually awarded it.

The law was much better put by Judge Brewster in *Commonwealth v. Haskell*, 2 Brewst. 491, thus: “That the true test lies in the word ‘power.’ Has the defendant in a criminal case the power to distinguish right from wrong? and the power to adhere to the right, and to avoid the wrong? Has the defendant, in addition to the capacities mentioned, the power to govern his mind, his body, and his estate?”

Indeed, there are very strong reasons for holding that the charge of Chief Justice Perley, in *State v. Pike*, 4 Am. Law Rev. 245, 246 [New Hampshire], is the true law on this subject. He instructed the jury, “that the verdict should be ‘not guilty, by reason of insanity,’ if the killing was the offspring or product of mental disease in the defendant; that neither delusion nor knowledge of right and wrong, nor design or cunning in planning and executing the killing, and escaping or avoiding detection, nor ability to recognize acquaintances, or to labor, or transact business, or manage affairs, is, as a matter of law, a test of mental disease; but that all symptoms, and all tests of mental disease, are purely matters of fact to be determined by the jury.”

The argument that leads strongly to this conclusion is to be found in the able dissenting opinion of Judge Doe, in *Boardman v. Woodman*, 47 N. H. 120 (see pages 146 et seq.).

It is not necessary for us to go this length in the case in judgment.

In a criminal case, the jury must be satisfied beyond a reasonable doubt of the defendant's mental capacity to commit the crime charged. This is but an application of the general principle, that the criminal intent must be proved as well as the act; that without a capable mind such intent cannot exist, the very element of crime being wanting. Such terms as "criminal intent," "vicious will," and "use of reason" are used in a very broad and general sense, including the idea that the mind must be in such a reasonable condition as to be capable of giving a guilty character to the act. The will does not join with the act, and there is no guilt when the act is directed or performed by a defective or vitiated understanding. So far as a person acts under the influence of mental disease, he is not accountable.

We wish in this case to be understood as simply holding that the qualification of the instruction asked by the defendant was not law, and for this reason the court below ought to have granted a new trial.

Judgment reversed, cause remanded, with directions to grant a new trial, and for further proceedings.

ELLIOTT, J., was absent.

CAPACITY TO COMMIT CRIME, WHAT CONSTITUTES, AND WHEN ONE IS NOT CRIMINALLY LIABLE FOR HIS ACTS: See *Commonwealth v. Rogers*, 41 Am. Dec. 458, note 463; *Carter v. State*, 62 Id. 539, note 545; note to *State v. Shippey*, 88 Id. 75; *Hopps v. People*, 83 Id. 231, note 239; *Scott v. Commonwealth*, 83 Id. 461, note 465.

INSANITY AS DEFENSE TO CRIME: See cases cited *supra*; note to *Commonwealth v. Rogers*, 41 Am. Dec. 463; extended note to *State v. Marler*, 36 Id. 402-411, where the subject is fully discussed; note to *People v. Garbutt*, 97 Id. 162; LAWSON ON Insanity as Defense to Crime.

UNSOUNDNESS OF MIND IS QUESTION OF FACT FOR JURY: See *Hill v. Nash*, 66 Am. Dec. 266.

THE PRINCIPAL CASE WAS REFERRED TO in *Bradley v. State*, 31 Ind. 509. It is reported in 9 Am. Law Reg. 532-535, and a one-page note appended discussing the question as to whether a defendant's knowledge of the difference between right and wrong with respect to the act in question, or his consciousness that such act was one that he ought not to do, is the sole test of legal accountability for crime. As there reported, the principal case was cited in *State v. Jones*, 59 N. H. 369, 391; *State v. Feller*, 32 Iowa, 53. In the principal case, the exact point decided is, that it is erroneous to instruct a jury that "if the defendant knew the difference between right and wrong in respect to the act in question, if he was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the state, then he is responsible for his act"; in other words, that such knowledge is the sole test of legal accountability. In *State v. Jones*, *supra*, it was held that insanity is mental disease, — disease of the mind; that an act pro-

duced by mental disease is not a crime; that if the defendant had a mental disease which irresistibly impelled him to kill his wife, —if the killing was the product of mental disease in him, —he was not guilty; that if the defendant had an insane impulse to kill his wife, and could have successfully resisted it, he was responsible; that whether every insane impulse is always irresistible is a question of fact; and that whether in this case the defendant had an insane impulse to kill his wife, and whether he could resist it, were questions of fact. In *State v. Feller, supra*, it was held that, in a criminal prosecution, where the insanity of the prisoner is the defense, it is incumbent on him to overcome the presumption of sanity, and establish his insanity, by a preponderance of testimony or evidence that is satisfactory; and that the rule requiring the evidence in a criminal prosecution to satisfy the jury, beyond a reasonable doubt, of the defendant's guilt, seems to be applicable only to the general conclusion of guilty or not guilty upon the whole evidence, and not to any one fact in the case.

CASES
IN THE
SUPREME COURT
OF
IOWA.

BURNHEIMER v. HART.

[27 IOWA, 19.]

JUDGMENT RECOVERED BY CREDITOR ON NOTE GIVEN AS COLLATERAL SECURITY against the parties thereto, including the debtor as indorser, will not of itself bar an action on the original debt, nor will payment thereof by the debtor operate as a satisfaction of the original debt beyond the amount paid, unless it was so understood or agreed.

ACTION on two notes made by the defendant. The defendant had transferred to the plaintiffs, as collateral security, the note of some third persons in his favor. The plaintiffs sued the makers of this note, and the defendant as indorser, and obtained judgment against all the parties. The defendant compromised the judgment by paying the plaintiffs a certain per cent thereof, and thereupon took an assignment of the judgment to himself. The instructions to the jury are stated in the opinion. The defendant had judgment, and the plaintiffs appealed.

D. P. Palmer and Amos Stoeckel, for the appellants.

M. H. Jones and H. H. Trimble, for the appellee.

By Court, **WRIGHT, J.** The court instructed the jury that the judgment against the defendant as indorser of the collateral note was a bar to a suit on the notes thus secured to the extent of such collateral, and that if, therefore, the judgment on such collateral was equal to or exceeded the amount of the notes now in suit, such collateral judgment would be a complete bar to the action.

This could hardly be the law under any state of facts, and is certainly not under the circumstances disclosed in this record. It in effect makes the collateral contract (or the agreement under which the collateral security was taken) supersede the original or principal one. It gives it a dignity and magnitude never contemplated by the parties, and certainly not by the law. It is, hence, bottomed upon a false assumption. A recovery upon a note may bar a recovery for that which formed the consideration for the note. But that would not be this case. The liability of defendant upon the original note is quite distinct from that upon his indorsement of the instrument which was given in pledge or security for the antecedent or original debt. The contracts are quite distinct. If this is not so, then a failure by plaintiffs to make proper demand and give due notice would not only release the indorser upon that which is a mere incident, but also upon the original or principal undertaking, and certainly this would not be claimed.

In this case, however, we need not go thus far, for defendant himself settled the judgment upon the collateral note, and took an assignment of it. And hence it seems to us that the true inquiry is, whether this settlement had the effect of paying or extinguishing the original note or indebtedness. It certainly would not, unless it was so agreed or understood. Defendant was the sole debtor as to the notes now in suit. As to them there is no surety. He was the surety as to the note transferred. By agreement, the surety in the one case, and the principal in the other, pays so much of the collateral debt, takes an assignment of it, or the judgment rendered thereon, and at once claims that the original debt is extinguished, or, at least, all right of action thereon is barred. If so, then it would be equally true if plaintiff had surrendered or assigned the collateral judgment without receiving any part of the same. And it would hence occur that, though the real and original debtor paid no part of his debt, and though he collected by the consent of his creditor the whole of the collateral judgment, such creditor could not sue him upon the original indebtedness, whatever his other securities, and however important, in view of "homestead" or other rights, that his contract should date anterior to the time of the indorsement of the collaterals. It certainly requires no argument to show the fallacy and injustice of such a position. The satisfaction of the collateral debt to the extent of that which it was given

to secure, might bar a recovery upon the original. But not a judgment merely against the collateral debtor, though the original debtor, by reason of his contract of indorsement, should be joined therein. These views substantially dispose of the case. And yet, turning to what is suggested in argument, rather than the record, a single other word seems necessary.

What effect a settlement by plaintiff with the makers of the note, which he held as collateral, without defendant's consent, might have upon defendant's rights, we need not inquire, as from the whole record it is indisputable that he (defendant) settled with plaintiff, and he cannot therefore complain that he was prejudiced thereby. Whether this settlement included the notes now in suit was a question of fact fairly submitted to the jury under apparently correct instructions. And yet we cannot say that the jury may have found for defendant upon this issue, and that therefore the error in the instructions first noticed contained no prejudice. The doctrine to which counsel refer, to wit, that if a judgment is right upon the face of the whole record, this court will not reverse, for an abstract cause has no application; for the testimony not all being here, we cannot say that the judgment is right. We do not need to indulge in presumptions to find error. The instruction as to the effect of the prior judgment concluded the whole case. It was plain, clear, unambiguous. Under the facts which the testimony tended to establish, the jury had no alternative.

To have found otherwise would have been most manifestly erroneous. The instruction was necessarily calculated to lead to a wrong result,—did, it is fairly apparent, so lead,—and the judgment must therefore be reversed.

PARTRIDGE v. HARROW.

[27 IOWA, 96.]

JUDGMENT ENTERED BY MISTAKE OF CLERK FOR SMALLER AMOUNT THAN ACTUALLY DUE MAY BE CORRECTED by an equitable proceeding, where the mistake was not discovered until after the period allowed by the statute in which to correct such errors on motion had expired, although the case was appealed to the supreme court, where the judgment was affirmed on motion, because the appeal was not perfected.

PETITION in equity, alleging that, on March 22, 1866, a judgment in favor of the plaintiffs, in an action against the defend-

ants, on a note, was ordered by the district court of Decatur County, and the clerk was directed to assess the amount due; that by mistake the clerk assessed the amount due at \$225.36, instead of \$370, and judgment was entered up accordingly; that the defendants appealed the case to the supreme court for delay, where the judgment was affirmed, on motion of the plaintiffs, the defendants having failed to perfect their appeal; that an execution was issued on this judgment, and the amount thereof collected; and that thereafter, and more than one year after the rendition of the judgment, the mistake was discovered. The petition asked that the judgment be corrected. The defendants demurred to the petition, and the demurrer was sustained. The plaintiffs appealed.

C. C. Nourse, for the appellant.

N. B. Baker, for the appellee.

By Court, BECK, J. The error in the judgment, as shown by the petition, was not the result of fault or negligence of plaintiffs, but of a mistake of the clerk. From the effect of this mistake, plaintiffs will lose a part of the sum justly due them from defendants, unless they can have relief by this or some other proceeding under the law. Under section 3499 of the Revision, such relief could have been had, leaving out of view the effect of the affirmance of the judgment in this court, if proper application had been made within one year: Sec. 3500.

But that term had elapsed before the discovery of the mistake, and for that reason the relief could not have been sought under that provision. It is unnecessary, therefore, to inquire whether the fact that an appeal had been taken, and the judgment affirmed, operated to deprive the plaintiffs of their remedy by motion in the district court.

Being without a remedy at law, and the mistake the result of no fault of plaintiffs, equity will grant them relief: *Cohen v. Dubose*, 1 Harp. Ch. 102; *Hiatt v. Calloway*, 7 B. Mon. 179.

The fact that the judgment of the district court had been affirmed in this court did not deprive that court of jurisdiction of this case. The judgment, as entered in the district court, was appealed from and affirmed, but that affirmance does not operate to prevent the correction of the judgment by the district court in respect to a matter that was not passed upon by this court. The petition shows that the affirmance of the judg-

ment in the amount as rendered by the district court was also a mistake, and it cannot be doubted that such mistake may likewise, by proper proceeding, be corrected.

The district court erred in sustaining the demurrer, and in dismissing the plaintiff's petition; its judgment is therefore reversed, and the cause is remanded for further proceedings.

Reversed.

POWER OF COURT TO CORRECT ITS JUDGMENT: See *Young v. State Bank*, 56 Am. Dec. 630, and note; *Lewis v. Ross*, 59 Id. 49; *Whitwell v. Emory*, 59 Id. 220; *Smith v. Hood*, 64 Id. 692; *Hill v. Hoover*, 68 Id. 70, and note; *Dodd v. Combs*, 77 Id. 150.

JUDGMENT, WHETHER MAY BE CORRECTED IN EQUITABLE PROCEEDING. — Equity may correct a judgment after the time allowed by statute in which to correct it on motion: *Stidener v. Coons*, 83 Ind. 187; *Snyder v. Ives*, 48 Iowa, 163; although satisfaction be entered: *Barthell v. Roderick*, 34 Id. 520; all citing the principal case. But a surety on an appeal bond, who had notice of an error in the amount of a judgment rendered against him twenty days after the rendition, cannot maintain a petition in equity more than two years thereafter to restrain its collection: *State v. Knapp*, 61 Id. 527; and where a verdict is indefinite, and does not express the true intention of the jury, and the mistake or omission is known upon the return of the verdict, relief cannot be sought in equity, since there is a complete and adequate remedy at law by motion: *McFaul v. Woodbury County*, 57 Id. 100; both distinguishing the principal case.

THE PRINCIPAL CASE IS ALSO CITED in *District Township of Newton v. White*, 42 Iowa, 613, and *Bond v. Epley*, 48 Id. 605, to the point that a court of equity will grant a new trial in an action at law after the time for applying for relief under the statute has elapsed, provided proper reasons be shown; in *Young v. Tucker*, 39 Id. 600, to the point that where the time for appeal from a decree in partition procured through fraud has passed, and the plaintiff is without other remedy, equity will afford relief; and in *Maynes v. Breckway*, 55 Id. 460, to the point that the erroneous action of a clerk in allowing a stay of execution after the expiration of the time permitted by statute for the filing of a stay bond may possibly be reviewed by an action in equity.

ILIFF v. BRAZILL.

[27 IOWA, 181.]

FARMERS ARE JOINT OWNERS, AND NOT PARTNERS, where they purchase a thrashing-machine in common, which they use and operate together, and for which they give the vendors a note, signed by both individually.

ACTION for money paid, work and labor done, etc., with a bill of particulars annexed to the petition. The answer contained a denial, and a plea of set-off, including, among other items, a charge of money paid to certain persons, Russell & Co., Hamilton, and others, with a bill of particulars annexed.

The replication contained a denial, and alleged payment of the account pleaded by way of set-off; but contained no allegation that any of the items in the set-off originated in any partnership transaction between the parties. The cause was referred, and the referee made a report, allowing and disallowing certain portions of the account of each of the parties, leaving a balance in favor of the plaintiff. The referee found in the twenty-fourth paragraph of his report that the defendant had paid the money to Russell & Co., to Hamilton, etc., but refused to allow the defendant for these items, on the ground that he and the plaintiff had been partners in running and operating a thrashing-machine, and that the money was so paid on claims held against the parties as partners. The referee found that the parties were farmers and neighbors, and had bought the machine in common, giving to Russell & Co., the vendors, a note signed by both individually. Judgment thereon had been rendered against both, and the defendant paid \$154.54 more than his share. The district court rendered judgment on the report, and the defendant appealed.

N. Corning and A. T. Wheeler, for the appellant.

Leffingwell and Brother, and Henry O'Connor, for the appellee.

By Court, DILLON, C. J. Remarking that we perceive no error in any ruling of the referee respecting the admission or exclusion of evidence, and that his finding of facts as to items of account allowed and disallowed show an exact familiarity with and a clear appreciation of the testimony, all of which we have examined in detail, we are brought at once to the only substantial question in the cause. The referee found that the defendant had established the fact of the payment of money by him to Russell & Co., to Hamilton, etc., as charged in his account, pleaded by way of set-off. He refused, however, to allow the defendant for these items, on the sole ground that he and the plaintiff had been partners "in running and operating a thrashing-machine, and that the money was so paid on claims held against the parties as partners." But being in doubt as to the right, under the pleadings and the law as modified by statute, to allow the defendant for money thus paid, the referee pursued the judicious course of finding and reporting the fact so that, if the court

should so adjudge, these sums might be allowed to the defendant, and a proper judgment entered, without any new trial upon the facts being necessary.

Adverting to, but without resting our decision on, the fact that these items were rejected on a ground entirely outside of the defenses thereto pleaded by the replication, it is our opinion that the evidence fails to establish that the parties, as to the ownership of the machine, were copartners, or anything more than joint owners.

They were farmers and neighbors, and bought the machine in common, giving to Russell & Co., the vendors, a note signed by both individually, and judgment thereon was rendered against both. Afterward plaintiff purchased defendant's share in the machine. If one of the parties had undertaken to sell and give title to a third person to the whole of the machine (an act which a partner could do, but a joint owner could not), we should have to hold on this record that he had no authority except to dispose of his own share.

On the judgment obtained on notes thus given for the purchase-money of the machine, the defendant paid, as found by the referee, \$154.54 more than his proportion.

Since the evidence failed to establish the existence of the partnership relation, this sum, as well as the other items mentioned in the twenty-fourth paragraph of the report of the referee, should be credited to the defendant, and the cause will be remanded with an order that this be done.

With this view of the case, it is not necessary to consider whether, under the Revision, which allows equitable defenses to be made and affirmative equitable relief to be given in an action at law, it would not be the right of the defendant, even if his account originated in a partnership transaction, to have it settled, and a balance ascertained which could be used as a set-off or cross-claim against the plaintiff; though the referee, as I think, was correct in the opinion expressed, that the pleadings, even if such right exists, were not framed with a view to obtaining relief in this direction.

The cause is remanded, with directions to the district court to credit the judgment with the items mentioned in the twenty-fourth division of the report of the referee, with interest.

Judgment modified.

SHARING IN PROFITS AND LOSSES AS EVIDENCE OF PARTNERSHIP: See *Ellsworth v. Tarr*, 62 Am. Dec. 749; *Sheridan v. Medara*, 64 Id. 484; *Chandler v. Howland*, 66 Id. 487; *Laffan v. Naglee*, 70 Id. 678; *Fitch v. Harrington*, 74

Id. 641; *Bronby v. Elliot*, 75 Id. 182; *Macy v. Combs*, 77 Id. 103; *Whitney v. Ludington*, 84 Id. 734, and the notes thereto. Where two persons bought a thrashing-machine, and gave their joint notes therefor, under an agreement that it was to be used in doing custom work, in the profits and losses of which they were to share equally, they are partners in the purchase: *Aultman v. Fuller*, 53 Iowa, 61, saying that the precise facts of the principal case did not appear, but that if the purchasers in it bought the machine for their individual use, it would seem quite clear that they did not buy it as partners.

DAVIDSON v. FOLLETT.

[27 Iowa, 217.]

ONE WHO FAILS TO DISCLOSE CERTIFICATE OF PURCHASE AT TAX SALE HELD BY HIM, on discharging other liens and encumbrances on the land, and who states that he had no other claims, will be estopped from setting up or relying on the tax deed procured thereunder, and the deed will be set aside as a cloud on title, whether or not the owner of the land knew that the taxes were unpaid for the year for which the land was sold; although it seems the holder of the tax deed is entitled to be repaid the sum advanced by him.

PETITION in equity, asking that a tax deed held by the defendant be set aside as a cloud on the plaintiff's title, and asserting that the defendant was estopped from relying thereon. The land covered by the deed consisted of a tract of 240 acres, worth from ten to twelve dollars per acre. The taxes thereon for the year 1863 had become delinquent, and the land was sold in 1864 to the defendant, who received a certificate therefor. Thereafter, on October 21, 1864, the plaintiff, through her agent, paid off certain mortgage liens, and other encumbrances, owned and controlled by the defendant and his wife, on the land in question, and other land, amounting to over five thousand eight hundred dollars, of which the defendant received in his own right over six hundred dollars. At the time of the settlement, the plaintiff's agent asked for an exhibition of all liens held by the defendant. The defendant did not disclose his tax certificate, but stated, as shewn in the opinion, that he had no other claims. The tax lien at the time amounted to about forty or forty-five dollars. In 1867, the defendant obtained his tax deed. The plaintiff had judgment, and the defendant appealed.

M. H. Tyrrell and John N. Rogers, for the appellant.

Cook and Drury, for the appellee.

By Court, WHISHT, J. The petition is not for the specific performance of a contract to convey an interest in land. The statute of frauds has, therefore, nothing to do with the case. In substance, the claim is, that defendant is, in equity, estopped from setting up or relying upon his tax deed, and that it should therefore be set aside, being, as it stands, a cloud upon plaintiff's title. The express charge is, that, notwithstanding the negotiations and settlement, the defendant fraudulently retained the certificate (of purchase at the tax sale), and procured a deed, which, being of record, is a cloud upon plaintiff's title, and a fraud upon her rights.

That plaintiff's purpose and intention was to remove all liens upon the land, we entertain no doubt, and that defendant should not, under the circumstances, be allowed to hold this deed; and that, upon every fair and equitable principle, the court was right in ordering it set aside, we are equally clear.

If anything is clear, or can be, it is, that plaintiff's agent, at the time of the settlement, asked for and desired an exhibition of all liens, that they might be met and discharged. By two disinterested and unimpeachable witnesses, it is expressly established that defendant, more than once, stated that he had no other claims; that all the liens held by him were removed. It is true, he says in his testimony, that this particular tax lien was expressly excepted. In this, however, he is not corroborated. All the positive testimony, as well as the undisputed facts, are against him. Thus the agent or attorney conducting the negotiation had money sent to him by his client, who resided at a distance, to clear the title of all encumbrance. The land was worth from ten to twelve dollars per acre, or say, two thousand five hundred dollars. To redeem this, with other land, all constituting the one farm, there was paid, on the day named (October 21, 1864), over five thousand eight hundred dollars, of which defendants received over six hundred dollars, upon liens claimed in his own right. This tax lien, then, amounted to not more than forty to forty-five dollars; and certainly nothing could be more unreasonable than that the parties should designedly, and without any well-developed motive or purpose, have left unsettled a claim and lien so small. They were all together; they met for the purpose of settling these claims: plaintiff's attorney asked for all; the defendant said then (as the testimony, we think, establishes) that he had none other; this, too, he said afterward

in the presence of another witness, when again appealed to by plaintiff's attorney to know if all liens were settled; and it certainly would be a great wrong to now allow defendant to retain a title obtained either by mistake or fraud. And in this view it is not material whether the full amount necessary to redeem was paid or not. For if, by defendant's mistake or fraud, and especially without fault on the part of plaintiff or her agent, there was in fact a failure to pay sufficient to cover this with other liens, and yet, if plaintiff believed she was paying it, and would have paid it but for such fraud or mistake, defendant cannot, and will not in equity be allowed to, assert this title. And this proposition would be true, whether applied to mortgage, judgment, tax, or other liens or encumbrances. It is founded in reason, is self-evident, and so well supported as to only need statement to meet approval: See, however, *Barber v. Lyon*, 15 Iowa, 37, and cases there cited; also, generally, on the question involved, *Pickard v. Sears*, 6 Ad. & E. 469; *Hawes v. Marchant*, 1 Curtis, 136; Story's Eq. Jur., sec. 146.

It is of but little moment whether plaintiff or her agent did or did not in fact know that the taxes were unpaid for the year 1863. Under the circumstances, defendant was bound to disclose this lien. If he did not, he is concluded from afterward setting it up. He was in a situation which compelled him to speak, and if he remained silent he must suffer the consequences. It would violate the plainest principles of equity to say that, though called upon to exhibit all his liens, though he met the debtor and holder of the title to receive what was his due, and assist in settling all encumbrances, he could protect himself, because the plaintiff knew that these taxes were unpaid.

A stands by and sees B purchase an estate of C, upon which he knows he has a lien, and encourages the purchase, knowing that B is ignorant of the lien, that he pays a full price, and yet afterward protects himself, or seeks to, upon the ground that his deed was recorded, and the purchaser was bound to take notice of it. To strike off just such fraudulent heads as this is the especial office and work of estoppel. And the more of these found in the judicial basket, the better for the integrity of the law and administration of justice.

Defendant stands by his title. The object of the petition is to set aside the deed. This was properly ordered. Whether defendant actually received a sum sufficient to cover this lien

with others may admit of much doubt. Indeed, we confess that we incline to the opinion that he did not. But this was no fault of plaintiff; she had a right to have the deed set aside without conditions; and especially as there is no claim, by defendant in his pleadings, or in any stage of the case, until in the argument here, that this sum should be repaid before depriving defendant of his title.

The judgment below will be affirmed, but without prejudice to defendant's right to recover the sum so advanced, if in any action brought therefor he shall show himself entitled to it.

Affirmed.

PERSON WHEN ESTOPPED BY HIS CONDUCT FROM SETTING UP TITLE TO OR LIEN ON LAND: See *Stinchfield v. Emerson*, 83 Am. Dec. 524, and note; *Phillips v. Clark*, 83 Id. 471; *Beardsley v. Foot*, 84 Id. 406; *Davis v. Davis*, 85 Id. 157; *Mills v. Graves*, 87 Id. 314; *Maple v. Kussart*, 91 Id. 214. The principal case is cited in *Adams County v. B. & M. R. R.*, 39 Iowa, 512, to the general proposition that one who remains silent when he should have spoken must continue silent when he desires to speak.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

KNIGHT v. WHITMAN.

[6 BUSH, 51.]

HOMESTEAD EXEMPTION APPLYING TO "ALL DEBTS AND LIABILITIES CREATED OR INCURRED AFTER" a date named, does not apply to a judgment recovered after that date in an action commenced before it, even though the judgment was recovered on an appeal taken after it; nor does it apply to the costs, which are merely incidents, and must be governed by the laws applicable to the debt or liability out of which they grow.

DEED DULY ACKNOWLEDGED AND LODGED FOR RECORD PASSES TITLE, as between vendor and vendee, though not recorded because the tax was not paid thereon; and any subsequent vendee may pay the tax and fees, and cause it to be recorded.

STATUTE MAKING IT DUTY OF OFFICER TO CAUSE LAND LEVIED ON to be valued before sale, gives no right to plaintiff or defendant to select an appraiser; and if the officer permits this, it is merely a courtesy on his part, and not the discharge of a legal duty.

QUALIFICATION OF APPRAISERS MAY BE SHOWN EITHER BY APPRAISER'S CERTIFICATE, or by the officer's return, where the statute requiring property levied on to be valued before sale does not require the certificate of the officer who qualifies the appraisers to accompany the written appraisalment.

SUIT in equity to recover the possession of land sold under execution. The opinion states the case.

James A. Dawson, for the appellant.

Barnett and Edwards, for the appellee.

By Court, **WILLIAMS, C. J.** In December, 1865, Whitman sued Knight in the Hart quarterly court for a hog, averred to

be worth \$30 dollars, which Knight controverted, and in March, 1866, the court adjudged in his favor; whereupon Whitman appealed the case to the circuit court, where he obtained a judgment for \$30 and costs, amounting to \$152.98, in March, 1867, which remains still in force.

Whitman sued out execution, and had it levied upon Knight's home farm of thirty-seven acres, and bid it off himself at \$125, being two thirds of its appraised value; obtained the sheriff's deed, and then brought this suit in equity to recover the possession which Knight resisted; but the court having adjudged against him, he has appealed to this court. We shall consider only the important alleged errors.

It is insisted that this judgment being in 1867, the homestead, not being worth one thousand dollars, was not liable to sale under this execution, but was protected by our statute of February 10, 1866 (Myer's Supplement, 714, 715), which enacted that, "in addition to the personal property now exempt from execution on all debts and liabilities created or incurred after the 1st of June, 1866, there shall be exempt from sale under execution, attachment, or judgment of any court, except to foreclose a mortgage given by the owner of a homestead, or for purchase-money therefor, so much land, including the dwelling-house and appurtenances owned by the debtor, as shall not exceed in value one thousand dollars."

Was this a liability incurred previous to June 1, 1866? The hog had been taken, and the suit therefor had been instituted previous to the day so fixed by said statute. It is true, the quarterly court adjudicated for the defendant, but the circuit court reversed this, and adjudicated in plaintiff's favor; so that this judgment ascertained the defendant's liability to the plaintiff, and being unreversed and still in force, is conclusive as to it.

This judgment conclusively fixed the defendant's liability under that suit, which must have existed when the suit was brought, else no judgment predicated upon that complaint could have been rendered. Then it has been judicially ascertained that the defendant was liable to the plaintiff when said suit was brought in December, 1865, and anterior to June 1, 1866; therefore said homestead exemption statute is inapplicable.

This court, in *Slater v. Sherman*, 5 Bush, 206, has decided that even in tort cases the liability was incurred at the time and by committing the tort. It is said, however, that the

costs were subsequently incurred; hence the homestead was not liable therefor.

It is sufficient to say that the exemption under the statute of February, 1866, is only applicable to debts and liabilities created or incurred after June 1, 1866; so that in all that class of cases existing prior thereto there is no homestead exemption. The costs of all such cases are only incidents attached thereto, and must be governed by the laws applicable to the debt or liability out of which they grew.

Appellant held this land by deed, which he had caused to be acknowledged and lodged in the clerk's office for record, but had not paid the tax on the same; hence the clerk had not recorded it. Still this deed, as between vendor and vendee, passed the legal title; and any subsequent vendee, we apprehend, might pay the fees and cause it to be recorded; so that from such recording the land would be protected against the creditors or subsequent innocent purchasers of appellant.

The sheriff caused the land to be valued, under oath, by two intelligent, disinterested housekeepers of the county; but it is said that appellant should have had the privilege of selecting one of them. Subsection 3 of section 2, article 13, chapter 36, 1 Stanton's Revised Statutes, 483, makes it the duty of the officer to cause it to be so valued. If he should permit the plaintiff and defendant each to select an appraiser, this would simply be a courtesy, and not the discharge of a legal duty, or allowing them to exercise a legal right, for the legal duty and power to execute it belongs to the officer.

There is nothing in this record the least manifesting that the appraisement was procured by fraud or conspiracy of the plaintiff with the officer; hence, though witnesses might differ in opinion from the appraisers, as they usually do among themselves, this is certainly no cause for invalidating the sale.

The policy of the statute is to secure to the defendant in the execution a year in which to redeem his land so sold, by paying the purchase price and ten per centum interest thereon, unless it shall sell for two thirds of its appraised value; and to ascertain this, the officer is to cause it to be valued, under oath, by two disinterested, intelligent housekeepers, which valuation is to be reduced to writing, signed, and returned with the execution. No statute requires it to bring two thirds of what witnesses may regard its value, and such evidence is wholly irrelevant except so far as it may go to establish fraud

by the plaintiff or officer. Nor does the statute require the certificate of the officer who may qualify the appraisers to accompany the written appraisal; but if the fact of such qualification be shown by the appraiser's certificate or the officer's return, this will suffice; and which, in this case, is shown by both.

Wherefore the judgment is affirmed.

RETROACTIVE HOMESTEAD LAWS ARE UNCONSTITUTIONAL: See note to *Cusic v. Douglass*, 87 Am. Dec. 464-468.

DEBT FOR PURCHASE-MONEY OF HOMESTEAD IS NOT DEBT CONTRACTED AFTER PURCHASE of homestead, so as to render the property exempt as to such debt: *Christy v. Dyer*, 81 Am. Dec. 493, and note 497.

DEED LODGED FOR RECORD, WITH TAX NOT PAID THEREON, is held, in *Phillip v. Clark*, 4 Met. (Ky.) 348, S. C., 83 Am. Dec. 471, to pass to the grantee only an equitable title, as against creditors and purchasers, and to be ineffectual as constructive notice under the Kentucky statute. Ordinarily, however, a deed is regarded as recorded, and effectual as notice, at and after the time when it is filed for record, or delivered to the recording officer for that purpose: *Johnson v. Burden*, 94 Id. 436, and note 439.

BETHEL v. BETHEL.

[6 BUSH, 65.]

SECOND JUDGMENT FOR SALE OF LAND FOR PAYMENT OF DEBTS AND FOR DISTRIBUTION, entered after the rendition of a former judgment for the same purpose, but prescribing different terms of sale, is void when rendered as an original judgment, and not upon suggestion or supplemental pleadings to modify or alter the first judgment; and a sale made under a combination of the terms of the two judgments is void.

COURT, HAVING RENDERED JUDGMENT ORDERING SALE OF LANDS OF DECEDENT, cannot, after the adjournment of that term, render another and different judgment upon the same record without further pleadings, suggestions, or evidence.

VOID SALE OF LANDS OF DECEDENT CANNOT BE VALIDATED by confirmation of the commissioner's report.

RULE to show cause why possession of land should not be awarded to the purchaser at a judicial sale.

Brown and Murray, and Cofer and Marriott, for the appellant.

W. B. Read, for the appellees.

By Court, WILLIAMS, C. J. Robert Kennedy died intestate in the year 1861, leaving an insufficient personal estate to pay his debts, and a tract of land of over five hundred acres.

D. P. Bethel administered, but he was afterward set aside, and the estate committed to the hands of James L. Hill, the sheriff, who filed a petition February 3, 1865, against the children and heirs at law, the late administrator and his securities, and the creditors of decedent, averring the insufficiency of the personal assets, asking a settlement and a sale of so much of the land as might be necessary to pay the debts.

The adult children and heirs, and the married woman, Mrs. D. P. Bethel, answered, asking a sale of the entire land instead of a portion and partition. She being privily examined, the court referred the matter to commissioners to take evidence, reports, etc., and December 23, 1865, rendered a final judgment ordering said land to be sold,—first in two tracts, as designated by the surveyor's plat in the case, and then in gross, and to report the sale most advantageous to the heirs, but not to sell unless the whole tract brought a sum equivalent to eighteen dollars per acre. This sale was to be upon one and two years' time; but should it not sell for that sum, then a sufficiency of a designated side was to be sold to pay the ascertained indebtedness of one thousand two hundred dollars and costs.

Whether any attempt to sell under this judgment was made does not appear; but December 17, 1867, another apparently original judgment was rendered "upon the petition, answers, various reports, exhibits, surveys, evidences," etc., without any supplemental pleadings or other steps, in which said land is directed to be sold on credits of nine, twelve, and eighteen months, and without any restriction as to price.

February 17, 1868, the commissioner offered said land for sale in the manner prescribed in the first judgment, and on the terms prescribed in the last one, and it was struck off to W. C. Bethel at \$5,379.

June 8, 1868, the commissioner made and filed his report of said sale, which was ordered to lie over for exceptions to the thirteenth day of the month, when it was confirmed, there being no exceptions.

December 3, 1868, W. C. Bethel, the purchaser, moved the court for a writ of possession for said land, which was overruled. But four days thereafter a rule was awarded on his motion against D. P. Bethel and wife, then in possession of the land, to show cause why the purchaser should not have possession, to which they, together with Judith Kennedy, another heir, responded that they, together with the three other chil-

dren and heirs, held said land jointly; that W. C. Bethel had paid no part of the purchase price; that a lien in their favor existed, but that the sale was irregular and void, being made in pursuance of a void judgment; and upon hearing, the court dismissed said rule, and from which W. C. Bethel prosecutes this appeal.

The second judgment does not appear to be supplemental, made upon any kind of suggestion to alter or modify the original one, but purports to be an original judgment itself.

It presents, therefore, a different question than would have arisen had it been a supplemental judgment, made upon proper suggestions, to alter or perfect the original one in some of its details. There can scarcely be any doubt but that the commissioner should have sold strictly according to one or the other, and could not combine them.

The court, having in the first judgment disposed of the case upon the petition, exhibits, and evidence, and rendered his judgment thereon, had no power after the adjournment of that term to render another and different judgment upon the same record without further pleadings, suggestions, or evidence; and such judgment was therefore a nullity, and conferred no power on the commissioner, whose only authority for the sale was therefore to be found in the first judgment. The first judgment gave him no power to sell the entire tract for less than eighteen dollars per acre, and that upon one and two years' time; his sale for a less sum, and on different credits, was therefore wholly unauthorized, and a departure from the only valid judgment in the case, and no confirmation of the sale could bind the heirs, especially the minors, and supply the want of a judgment. Knowing the terms of the only valid judgment in the case, they had a right to suppose that the court would see that the sale should conform thereto, and were not bound to attend every court to resist an unauthorized and void sale.

The court fully disposed of the cause, as made out by the pleadings and evidence as to the sale, in the first judgment, and no other judgment can be rendered thereon; however, it might render a supplemental judgment, upon proper proceedings for that purpose.

The sale can only be valid when made in pursuance of the judgment, and no invalid sale can be sanctified by a mere confirmation of the commissioner's report.

The court properly held that the last judgment, and the sale

made in pursuance thereof, were invalid and unenforceable, and correctly set the sale aside.

Wherefore said judgment is affirmed.

ORDER OF SALE CAN BE AMENDED NUNO PRO TUNC only by means of some matter of record, or matter *quasi* of record: *Summersett v. Summersett's Adm'r*, 91 Am. Dec. 494, and note 496.

CONFIRMATION OF JUDICIAL SALE, EFFECT OF: See *Kochler v. Ball*, 83 Am. Dec. 451, and note 457. The principal case is cited to the point that a sale of land is valid only when made in pursuance of the judgment, and an invalid sale cannot be "sanctified" by a mere confirmation of the commissioner's report: *Moore v. Jeffers*, 53 Iowa, 208.

GOSSOM v. BADGETT.

[6 BUSH, 97.]

SEVERAL ACTIONS COULD NOT BE MAINTAINED ON JOINT CONTRACT before the adoption of the code in Kentucky.

NO PROVISION OF KENTUCKY CODE ABROGATES PRINCIPLE THAT PLAINTIFF CAN RECOVER only upon proof of the cause of action alleged in his pleading.

FAILURE OF PROOF EXISTS UNDER CODE SYSTEM AS WELL AS AT COMMON LAW, when the plaintiff, in an action against one defendant, declares upon a joint undertaking of the defendant and another, and proves only a separate agreement of the defendant; for there is a want of identity between the contract declared on and the contract proved, which would prevent the judgment from being a bar to another action on the contract proved.

ACTION upon contract. The opinion states the case.

A. J. James, for the appellant.

W. L. Dulaney and John E. Halsell, for the appellee.

By Court, HARDIN, J. Near the close of the late civil war, Thompson Gossom, Cornelius Jenkins, and John C. Jenkins, of Warren County, to avoid being coerced into the military service of the United States under a draft then about being enforced, through said Gossom, engaged H. M. Garret, a "substitute broker" at Louisville, to furnish and procure to be accepted a substitute for each of them, for the sum of one thousand dollars; and in pursuance of their arrangement with Garret they placed one thousand dollars each in the hands of W. H. Newman, of Louisville, to be paid to Garret for them, respectively, upon his complying with his agreement.

It appears that shortly afterward they received informa-

tion through the provost-marshal at Bowling Green that substitutes had been furnished and accepted for Gossom and Cornelius Jenkins, but so far as that officer had been informed, none had been obtained for John C. Jenkins; and acting on the belief that this was so, and that the one thousand dollars deposited by John C. Jenkins remained in Newman's hands, Gossom, with the assent of Jenkins, and in anticipation of the use of said one thousand dollars, which it was believed would be refunded by Newman, engaged James R. Badgett, a substitute broker of Bowling Green, to furnish a substitute for Jenkins for one thousand dollars, which Badgett did, and afterward took an order drawn on Newman by said J. C. Jenkins, which is as follows:—

“March 11, 1865.

“Mr. Wm. H. Newman, you will please pay to Jas. R. Badgett, or order, one thousand dollars, to pay for a substitute put in by him at Bowling Green, Kentucky.

“JOHN C. JENKINS.

“SARAH JENKINS.”

Newman, having already paid the money to Garret upon notice that he had furnished a substitute for Jenkins, refused to pay the order, which on presentation was protested.

In January, 1866, Badgett instituted this suit against said John C. Jenkins and Sarah Jenkins, as the drawers of said order. But by an amended petition, filed in August, 1866, said Gossom was joined as a defendant, and the plaintiff set forth a joint undertaking by Gossom and J. C. Jenkins, to pay him said sum of one thousand dollars in consideration of his furnishing said substitute for Jenkins.

The defendants filed separate answers,—J. C. Jenkins alleging as to the order set up by the original petition that it was without consideration, and procured through fraud, and he and Gossom controverting the material averments of the amended petition; and Sarah Jenkins denied having undertaken to pay the plaintiff's demand, or that said order was her act and deed.

A jury, having been sworn to try the issues, and having heard the evidence for the plaintiff, were, on motion of John C. and Sarah Jenkins, directed to find a verdict as to them, and thereupon a verdict was returned for said John C. and Sarah Jenkins; and the trial progressed as to Gossom, and resulted in a judgment against him for one thousand dollars. And the court having rendered a judgment in conformity to

these verdicts, and refused to grant a new trial, Gosson prosecutes this appeal.

Although the evidence conduced to establish a separate liability of the appellant to the plaintiff, it does not appear that the joint undertaking alleged to have been made by the appellant and Jenkins was so proved that a joint verdict thereon could have been sustained. No motion was made during the trial to amend the petition so as to conform the pleading to the evidence, nor was there any objection to the evidence by the defense on the ground that it was not applicable to any issue formed by the pleadings. But the question was raised by objections of the defendant to instructions which were given, and by the motion for a new trial, whether the verdict, though in conformity to the weight of evidence, was sustained under the issue; or in other words, whether there was not a failure of proof to support the cause of action alleged in the petition; and that question is now presented for the decision of this court.

It may be premised that although, before the adoption of the civil code, several actions could not be maintained upon a joint contract, by the thirty-ninth section of the civil code the rule of the common law is so changed that "when two or more persons are jointly bound by contract, the action thereon may be brought against all or any of them, at the plaintiff's option." Therefore now, upon proper allegation and proof, a recovery may be had against part of several joint obligors without suing the others. But there is no provision of the code abrogating the well-established principle that the plaintiff in an action can only recover upon proof of the cause of action alleged in his pleading: *Kearney v. City of Covington*, 1 Met. (Ky.) 339. And although, according to section 156 of the code, "no variance between the allegation in a pleading and the proof is to be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits," yet it is provided by the section 158 of the code that where "the allegation of the claim or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance, but a failure of proof."

As there was no objection to the evidence, nor any complaint that the defendant was misled by the variance between the evidence and the pleading, the discrepancy is not a ground of

reversal in this court, unless it should be deemed a failure of proof within the meaning of said section 158 of the code. It is essential, therefore, to ascertain from the reasons for distinguishing between joint and several demands founded on the same consideration whether the substantial rights of the parties require that they should be treated as different causes of action.

In the case of *Brown v. Warner*, 2 J. J. Marsh. 37, in which, upon a joint demand, a recovery was had against one of two defendants, this court held that "the contract, as charged in the declaration, must be so far sustained by a correspondence with that proved as to be identified with it; then the judgment will bar another suit on the same contract. But if the contract proved varies materially from that declared on, the plaintiff ought not to recover." And under our former system of practice, a plaintiff in a joint action against several might recover against part only, the other defendants being discharged on personal defenses; yet although his right of recovery was thus reduced to a single defendant, he could only recover by proving his demand as alleged: 1 Chitty on Pleading, 45. It was not therefore because the plaintiff could recover against all of several co-obligors that he was required to sue them jointly, but because the contract, being a joint one, should be declared upon accordingly. So, as in this case, if the contract was a separate undertaking, the plaintiff could not recover on the allegation of a joint liability. The reasons of the rule requiring this correspondence between the necessary allegation and proof to sustain a recovery are sufficiently stated in the case of *Brown v. Warner*, *supra*; and they are equally applicable to our present system of practice. We are of the opinion therefore, that, although the evidence in this case might be sufficient to sustain the verdict of the jury in a separate action against the appellant, there was a failure of proof of the claim as set forth against the appellant, and for that reason the judgment must be reversed.

The action of the court is complained of on several other grounds; but except so far as it was inconsistent with the views we have expressed, no valid objection to it is perceived.

Wherefore the judgment is reversed, and the cause remanded for a new trial, with directions to allow the parties to amend their pleadings.

WHERE PLAINTIFF DECLARES UPON PAROL PROMISE, and the proof shows that his action is based upon a sealed instrument, the variance is fatal.

for he cannot set up one cause of action and prove another: *Dougherty v. Matthews*, 88 Am. Dec. 126, and note 129, citing prior cases upon what constitutes a variance. The evidence must correspond to the allegations and be confined to the issues, and if, in the examination of witnesses, facts come out which would furnish ground for relief or defense, such facts must be disregarded, unless they are warranted by the allegations in the pleadings: *Finley v. Quirk*, 86 Id. 93. Under the code system, however, a variance between allegation and proof is to be disregarded, unless it appears to have misled a party to his prejudice: *Dubois v. Beaver*, 82 Id. 326.

McMURRAY v. SHUCK.

[6 BUSH, 111.]

EXEMPTED ARTICLES ARE PROPERLY SET APART FOR BENEFIT OF FAMILY consisting of the debtor, who was an unmarried *bona fide* housekeeper, an unmarried sister, and two brothers, all under twenty-one years of age, living with him, whose parents were both dead, and whose support and education he had assumed, they being without means. And the court properly refused to allow provision to be made for a brother over twenty-one years of age, and for servants.

EXEMPTION LAWS ARE NOT INTENDED TO PROVIDE FOR SUPPORT OF OPERATIVES hired by debtor to prosecute his business, either in cultivating a farm, or in the performance of other service.

APPEAL from a judgment of the circuit court. The opinion states the case.

A. J. James, for the appellant.

Randle and Tuler. and John Rodman, for the appellee.

By Court, PETERS, J. The object of the exemption laws was doubtless to protect from execution, and secure to the immediate family of the debtor, he being a *bona fide* housekeeper, the enumerated articles; the family consisting of those that the debtor was in legal contemplation bound to provide for by obligations higher than such as bound him to pay his debts, and who, from tender years and other disabilities, were unable to provide for themselves; but it was not the intention of the legislature to provide for the support of operatives hired by the debtor to prosecute his business, either in cultivating a farm, or the performance of other service. If such construction be given to the statutes, then that which was intended merely to secure the family of an unfortunate and indigent debtor against want would be soon perverted to the unholy purpose of enabling such debtors as should be so disposed to deprive their creditors of no inconsiderable amount of their

property, and thereby avail themselves of the beneficent objects of the legislature to perpetrate a fraud on creditors. To such a construction we cannot give our sanction.

The evidence shows that the debtor was a *bona fide* house-keeper, with an unmarried sister and two brothers, all under twenty-one years of age, living with him, whose parents were both dead, and whose support and education he had assumed, they being without means. The circuit court, therefore, very properly ordered the exempted articles set apart for the benefit of the family thus constituted, and properly refused to allow provision to be made for the brother over twenty-one years of age and the servants.

Wherefore the judgment is affirmed, both on the original and cross-appeal.

WHO IS HEAD OF FAMILY, AND WHO CONSTITUTE FAMILY. — This topic is treated in the note to *Wade v. Jones*, 61 Am. Dec. 536-593; and see also the note to *Brown v. Hebard*, 91 Id. 423; *Denny v. White*, 88 Id. 596; *Hoffman v. Newhaus*, 98 Id. 492; and *Seaton v. Marshall*, *post*, p. 679. The principal case, and *Seaton v. Marshall*, *supra*, are cited in *Connaughton v. Sands*, 32 Wis. 387, 392, to the point that although, in general, it is the husband, father, or mother who is the head of the family within the contemplation of the exemption statute, yet where a son of full age assumes the obligation of providing for a widowed mother and her children, with whom he lives, and who are dependent upon him, he is in legal contemplation the head of the family.

FORD v. BUCKEYE STATE INSURANCE COMPANY.

FORD v. MAGNOLIA INSURANCE COMPANY.

[6 BUSH, 122.]

ONE WHO NEGOTIATES FOR POLICIES OF INSURANCE for a commission paid by the company is an agent of the company, within the statute of Indiana requiring such agents to comply with prescribed conditions in order that the company may sue on its contracts, though he has no authority to bind the company by contracts.

CONTRACT OF INSURANCE IS EXECUTED AT PLACE WHERE LAST ACT IS DONE which is necessary to complete the transaction and bind both parties. This act may be the issuance of the policy and transmission of it by mail; but where something further remains to be done in another state, as the approval and receipt of premium notes by an agent in that state, and a delivery of the policy by him in the same place, that state will be the place of the contract, and not the state where the policy was issued.

CONTRACT VOID IN STATE WHERE MADE cannot ordinarily be enforced in another state.

PREMIUM NOTES GIVEN FOR POLICY OF INSURANCE WHICH IS NOT ENFORCEABLE in the state where the contract of insurance is made are not enforceable as between the parties in another state

ACTION upon promissory notes. The opinion states the case.

Barret and Roberts, and St. John Boyle, for the appellant.

William Atwood, for the appellees.

By Court, **HARDIN, J.** These causes, involving questions substantially analogous, were by consent heard together by the Jefferson court of common pleas, without the intervention of a jury, and the trial resulted in a judgment in favor of the plaintiffs for \$636.50 in each case, from which the defendant has appealed to this court.

The suits were upon promissory notes executed by the appellant, in consideration of insurance undertaken on his two steamboats, the *St. Nicholas* and *St. Charles*, by the appellees, as corporations located in the state of Ohio, the boats insured being at the time at New Albany, Indiana.

The defense in each case was, that the contracts of insurance on the part of the plaintiffs were made by *L. C. Ferry*, their agent, in the state of Indiana, and that said notes were given and the policies of insurance accepted in that state, and that no action could be maintained on the notes, because said agent effected the insurance without having complied with any of the requirements of the following act of the general assembly of the state of Indiana, which was approved June 17, 1852 (1 Gavin and Hord's Statutes, 372):—

"Sec. 1. Be it enacted by the general assembly of the state of Indiana, that agents of corporations not incorporated or organized in this state, before entering upon the duties of their agency in this state, shall deposit in the clerk's office of the county wherein they propose doing business therefor the power of attorney, commission, appointment, or other authority under or by virtue of which they act as agents.

"Sec. 2. Said agents shall procure from such corporations, and file with the clerk of the circuit court of the county wherein they propose doing business, before commencing the duties thereof, a duly authenticated order, resolution, or other sufficient authority of the board of directors or managers of such corporations, authorizing citizens or residents of this state, having a claim or demand against such corporation, arising out of any transaction in this state with such agents, to sue for and maintain an action in respect to the same in any court

of this state of competent jurisdiction, and further authorizing service of process in such action on such agent to be valid service on such corporation; and that such service shall authorize judgment and all other proceedings against such corporation.

"Sec. 3. The service of the process on such agents, in actions commenced against such corporation, shall be deemed a service on the corporation, and shall authorize the same proceedings as in other cases.

"Sec. 4. Such foreign corporations shall not enforce, in any courts of this state, any contract made by their agents, or persons assuming to act as their agents, before a compliance by such agents, or persons acting as such, with the provisions of sections 1 and 2 of this act.

"Sec. 5. Any person who shall, directly or indirectly, receive or transmit money or other valuable thing to or for the use of such corporations, or who shall in any manner make or cause to be made any contract, or transact any business for or on account of any such foreign corporations, shall be deemed an agent of such corporation, and be subject to the provisions of this act relating to agents of foreign corporations.

"Sec. 6. The foregoing section shall not apply to persons acting as agents for foreign corporations for a special or temporary purpose, or for purposes not within the ordinary business of such corporations; nor shall it apply to attorneys at law as such.

"Sec. 7. Any person acting as agent of foreign corporations as aforesaid, neglecting or refusing to comply with the foregoing provisions as to agents, shall, upon presentment or indictment, be fined in any sum not less than fifty dollars."

The facts proved on the trial, so far as deemed material, are that L. C. Ferry resided at New Albany, Indiana, and was engaged in the business of effecting fire and marine insurances in the offices of the appellees and other foreign insurance companies; acting as a broker in procuring applications to be made and policies to be issued thereon, which were sent to him at New Albany, to be delivered to parties assured upon their paying or arranging in his hands the premium rates exacted; and although he was not authorized, as agent of the appellees, to take risks, and bind them by contracts which they might not ratify or adopt, he was so far the employee of the appellees as to be entitled to receive from them commissions, as compensation for his services, on all

premium notes or payments for risks taken through his agency or intervention between the appellees and the assured; and under a contract with the appellees, he looked to and received from them his compensation for services so rendered, receiving nothing, and being entitled to nothing, for such services from the parties assured. And acting on the faith of this arrangement between him and the appellees, he solicited of and obtained from the appellant, at New Albany, permission to apply for and effect with the appellees the insurances on his boats; and said Ferry, acting through his brother, Francis Ferry, at Cincinnati, caused the policies of insurance to be prepared for delivery to the appellant, and sent to said L. C. Ferry, at New Albany, there to be delivered by him to the appellant upon his executing and delivering to Ferry for the appellees the premium notes in controversy, which was done, and the notes were transmitted by Ferry to his brother at Cincinnati, who delivered them to the appellees, Ferry having at the execution of the notes delivered the policies to the appellant.

These are substantially the facts conducing to show the agency of Ferry for the appellees; and it appears from his own testimony that he did not comply with any of the requirements of said act of the Indiana legislature.

Admitting that the arrangement or contract between the appellees and Ferry did not create such an agency in him as would enable him to bind them by contracts, or other acts of his not sanctioned or expressly authorized by them, we are, nevertheless, of the opinion that his general service of the appellees was such that he should be deemed their agent, according to section 5 of the Indiana statute, so far as to render the contracts made through his intervention subject to the provisions of the statute, if, in fact, they were consummated in the state of Indiana.

But as we construe the statute, it does not apply to contracts relating to insurance made beyond the limits of that state, however initiated or procured; but its provisions were intended to prohibit the enforcement of contracts made within that state through the agency of such persons as the act describes, without a compliance with its requirements. The principal question to be determined, therefore, is, whether the contract was consummated in Indiana, where Ferry and the appellant were, or in the state of Ohio, where the insurance companies were located.

It has been repeatedly decided that a contract of insurance may be completed by the issuing of a policy, and its transmission by mail or otherwise to the party assured, although in a distant state; and this is the import on this subject of the cases of *Hyde v. Goodnow*, 3 N. Y. 266, and *Huntley v. Merrill*, 32 Barb. 626. But in these cases, and others to which we have been referred, the execution and delivery of the policies were the last acts necessary to complete the transaction; and the transmission of the policy being equivalent to an actual delivery, both parties became bound by the contract as soon as that was done, and therefore the place from which the policy was so sent to the assured was held to be the place of the contract.

But there is a marked difference between those cases and this. As at the time the policies were sent forward from Cincinnati the premium notes were still to be given, and their approval and acceptance by Ferry was required as a condition precedent to the delivery of the policies to the appellant, it is manifest that neither party could be bound until the notes were accepted, and the policies delivered by Ferry. This having been done at New Albany, Indiana, that must be regarded as the place of the contract: 2 Parsons on Contracts, 582.

It is insisted, however, for the appellees, that if said contracts could not be enforced in the courts of Indiana, the notes were nevertheless not absolutely void, and the appellees were entitled to a recovery upon them in the courts of this state, notwithstanding the prohibition of the Indiana statute. But it is a general rule, applicable to the invalidity of contracts, that if void or illegal by the laws of the place of the contract, they are generally held void and illegal everywhere: Story on Conflict of Laws, sec. 243. And where a contract is declared void, or shown to be illegal by the law of the state or country where it is made, it cannot ordinarily be enforced as a valid contract in any other country: *Hyde v. Goodnow*, *supra*; and unless to be performed in some other country where the contract would be legal, which does not appear in this case, such contracts are universally held to be void.

It seems to us, therefore, that said judgments are erroneous.

Wherefore the judgments are reversed, and the causes remanded for a new trial, and for further proceedings not inconsistent with this opinion.

WHERE CONTRACT IS DEEMED TO HAVE BEEN MADE. — A distinction is taken by many authorities between the law governing the validity of a contract and the law controlling its construction and effect, where the contract is made in one state and is to be performed in another; and its validity is said to be determined by the law of the place where it is made, and its construction and effect by the law of the place of performance: See *Hosenschein v. Barnes*, 5 Dill. 482; *Shuenfeldt v. Junkermann*, 20 Fed. Rep. 357; *Graves v. Roy*, 13 La. 454; S. C., 33 Am. Dec. 568; *contra*, *Blanchell v. Webster*, 23 Blatchf. 537. This, however, is a question upon which there is considerable contrariety of opinion, as well as many limitations varying with changing circumstances. Theoretically, it should be settled by the intention of the parties: *Hyatt v. Bank of Kentucky*, 8 Bush, 193; *Story on Conflict of Laws*, sec. 224. And it may be stated generally that the validity, as well as the construction and effect, of a contract, will be determined by the *lex loci*, unless it is to be performed in another place: *Waldron v. Ritchings*, 9 Abb. Pr., N. S., 359; *Backhaus v. Selden*, 29 Gratt. 581; *Hyatt v. Bank of Kentucky*, 8 Bush, 193; and that a contract void where it is made will not be enforced elsewhere: The principal case. These preliminary remarks are intended merely to indicated broadly what may give rise to the question where a contract is deemed to have been made, which is the topic to be treated in this note.

CONTRACT MADE WHERE LAST ACT OF ASSENT DONE. — A contract is complete when nothing further remains to be done to give either party a right to have it carried into effect, or in other words, when the last act is done which is necessary to render the contract obligatory: *MacTier v. Frick*, 6 Wend. 103; *Hamilton v. Lycoming Ins. Co.*, 5 Pa. St. 339. Therefore, where the parties are residents of different states, the state where the final assent is given, or the last act necessary to complete it is done, is the place where the contract is made, notwithstanding all preliminary arrangements were made in the other state: The principal case; *Whiston v. Stockder*, 8 Mart. 95; S. C., 13 Am. Dec. 281; *Miliken v. Pratt*, 125 Mass. 375; *Ames v. McCamberg*, 124 Id. 85; *Northampton Live Stock Ins. Co. v. Tuttle*, 40 N. J. L. 476; *Shuenfeldt v. Junkermann*, 20 Fed. Rep. 357. This is the only universal rule that can be stated upon this subject; but it is fundamental and universal, and is the "principle" upon which all the cases are or should be decided. For example, in *Waldron v. Ritchings*, 9 Abb. Pr., N. S., 359, the plaintiff, who was at the time in New York, agreed with the defendant, the manager of an opera in Philadelphia, to go there and make her *debut*, and she was assured, if she did not fail in the estimation of the public and the press, of an engagement upon terms specified in the negotiation between the parties. In this case it was held that the contract was not made in New York, but in Philadelphia, upon her fulfilling the test of success. And so a receipt signed in New Hampshire for money received by the borrower's agent in Massachusetts, the receipt being delivered to the lender in the latter state, is a contract made in Massachusetts: *Hill v. Chase*, 9 N. E. Rep. 30 (Mass.).

It has also been stated that "the general rule of law is, that a contract takes effect, as such, at the place where it was intended to be delivered, and become operative, and the liability of the parties is determined by the law of that place: *Les v. Sellock*, 33 N. Y. 615; *Tilden v. Blair*, 21 Wall. 246; *Waynes Co. Bank v. Low*, 81 Id. 566": *Richardson v. Draper*, 23 Hun, 190, *per Dykman*, J. This principle applies especially to negotiable instruments.

PLACE WHERE ASSENT TO PROPOSAL IS MAILED IS PLACE OF CONTRACT. Where a person in one state writes to a person in another state a letter

containing an offer or proposal, and the latter writes in reply a letter accepting the proposal, the contract is complete when the letter of assent is deposited in the post-office, properly addressed: *Mactier v. Frith*, 6 Wend. 103; *Adams v. Lindsell*, 1 Barn. & Ald. 681; *Dunlop v. Higgins*, 1 H. L. Cas. 381; *Stochen v. Collins*, 7 Mees. & W. 515; see *Kennedy v. Lee*, 3 Mer. 452. And the place of the contract is the place where the letter of acceptance is mailed, and not the place where the letter is received: *Vassar v. Camp*, 14 Barb. 341; *Clark v. Dales*, 20 Id. 42; *Bell v. Packard*, 69 Me. 105; *Taylor v. Merchants' Ins. Co.*, 9 How. 390; *McIntyre v. Parks*, 3 Met. 207. This rule applies, although the party executing the agreement declares in effect that he does not intend to be bound until he receives an answer from the other party with a duplicate of the contract executed by him; for in such case the agreement is perfected so as to make it mutually obligatory, when the duplicate executed by the party to whom it was sent for execution is deposited in the post-office, addressed to the other party: *Vassar v. Camp*, 14 Barb. 341.

GUARANTY is a contract which, like a promissory note, need be signed and executed by but one party. Such being the case, it is immaterial where the mere formal execution of the paper writing takes place; but the location of the contract will be the place where it is put into operation and effect. Therefore, where a person draws up and signs a guaranty in one state and sends it to a person in another state, the contract is complete only when the guaranty is received and acted on by the latter, and not before, and the latter state is the place of the contract: *Milliken v. Pratt*, 125 Mass. 375; *Richardson v. Draper*, 23 Hun, 188; see *Jordan v. Dobbins*, 122 Mass. 168. In *Milliken v. Pratt*, *supra*, Gray, C. J., says: "The general rule is, that the validity of a contract is to be determined by the law of the state in which it is made; if it is valid there, it is deemed valid everywhere, and will sustain an action in the courts of a state whose laws do not permit such a contract: *Scudder v. Union National Bank*, 91 U. S. 406. Even a contract expressly prohibited by the statutes of the state in which the suit is brought, if not in itself immoral, is not necessarily nor usually deemed so invalid that the comity of the state, as administered by its courts, will refuse to entertain an action on such a contract made by one of its own citizens abroad in a state, the laws of which permit it: *Greenwood v. Curtis*, 6 Mass. 358; *McIntyre v. Parks*, 3 Met. 207. If the contract is completed in another state, it makes no difference in principle whether the citizen of this state goes in person or sends an agent, or writes a letter across the boundary line between the two states. As was laid down by Lord Lyndhurst: 'If I, residing in England, send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them': *Pattison v. Mills*, 1 Dow & C. 342, 363. So if a person residing in this state signs and transmits, either by a messenger, or through the post-office, to a person in another state, a written contract which requires no special forms or solemnities in its execution, and no signature of the person to whom it is addressed, and is assented to and acted on by him there, the contract is made there, just as if the writer personally took the executed contract into the other state, or wrote and signed it there; and it is no objection to the maintenance of an action thereon here that such a contract is prohibited by the law of this commonwealth: *McIntyre v. Parks*, above cited. The guaranty bearing date of Portland, in the state of Maine, was executed by the defendant, a married woman, having her home in this commonwealth, as collateral security for the liability of her husband for goods sold by the plaintiffs to him, and was sent by her through him by mail to the plaintiffs at Portland. The sales of the goods ordered by

him from the plaintiffs at Portland, and there delivered by them to him in person, or to a carrier for him, were made in the state of Maine: *Orcutt v. Nelson*, 1 Gray, 536; *Kline v. Baker*, 99 Mass. 253. The contract between the defendant and the plaintiffs was complete when the guaranty had been received and acted on by them at Portland, and not before: *Jordon v. Dobbins*, 122 Id. 168. It must therefore be treated as made and to be performed in the state of Maine."

SALES. — Sales of personal property, whether made to the vendee personally, or ordered by letter, are regarded as made at the place where the vendor shows his assent to the proposal by delivering the goods to a carrier for the vendee; and if valid in that place, may be enforced in the state of the vendee's residence: *Milliken v. Pratt*, 125 Mass. 374; *Orcutt v. Nelson*, 1 Gray, 536; *Abberger v. Marrin*, 102 Mass. 70; *Ely v. Webster*, 102 Id. 304; *Brockway v. Maloney*, 102 Id. 308; see *Kline v. Baker*, 99 Id. 254; *Finch v. Mansfield*, 97 Id. 89; *Marchant v. Chapman*, 4 Allen, 362; *Hardy v. Potter*, 10 Gray, 89; *Bugh v. James*, 5 Allen, 107; *Dolan v. Green*, 110 Mass. 322; *Jameson v. Gregory*, 4 Met. (Ky.) 370; *Garland v. Lane*, 46 N. H. 245. (These cases involve the question of a violation of liquor laws.) But the contract may be complete without delivery, and the locality of the contract may be the state where the vendee resides, if the contract of sale be fully agreed to in that state by the vendor or his duly authorized agent: *Weil v. Golden*, 141 Mass. 364; *Webber v. Howe*, 36 Mich. 150; see *Bowman Distilling Co. v. Nutt*, 34 Kan. 724; *Feineman v. Sachs*, 33 Id. 62; S. C., 52 Am. Rep. 547; *Parsons Oil Co. v. Boyett*, 44 Ark. 230. So it is held that *assumpsit* may be maintained in Rhode Island for breach of a contract of sale there made, and there valid, of goods in process of manufacture, although the delivery was to take place in New York, and though the contract was invalid by the New York statute of frauds: *Hunt v. Jones*, 12 R. I. 265. But where a contract signed in Massachusetts for the purchase of whisky clearly contemplates that the title shall pass when the whisky is in a bonded warehouse in Kentucky, the contract is for a sale to be made in Kentucky, and evidence that the seller had no license in Massachusetts is immaterial: *Sherley v. McCormick*, 135 Mass. 126; see "Agent," *infra*.

AGENT. — A principal may authorize his agent to make contracts for him, and if he make such contracts in foreign states, it is the same as if the principal were there in person. The locality of the contract is the state where it is made, and is not at all affected by the domicile of the principal: *Pattison v. Mills*, 1 Dow & C. 342, 363, per Lord Lyndhurst; *Milliken v. Pratt*, 125 Mass. 375; *Malpica v. McKown*, 1 La. 248. Where, however, the agent is not authorized to make contracts, but only to solicit orders, as is usually the case with commercial travelers, and when he receives an order reports it to his principal for approval, the last act necessary to render the contract complete and obligatory is this act of approval and ratification on the part of the principal; therefore, the place where the contract is made is the place where the principal resides and ratifies and approves the contract solicited and secured by the agent: *Tegler v. Shipman*, 33 Iowa, 194; *Taylor v. Pickett*, 52 Id. 469; *Engs v. Priest*, 65 Id. 232; *Oliver v. Lake*, 3 La. Ann. 78; *Fuller v. Leet*, 59 N. H. 163; *Lauten v. Rowan*, 59 Id. 215; *Mack v. Lee*, 13 R. I. 293; *Shuenfeldt v. Junkermann*, 20 Fed. Rep. 357.

But where by the terms of the sale the title was not to pass until payment by the vendees, which was to be made in the state where the vendees were domiciled, to the agent in that state, the contract was completed in that state, and was governed, as to its validity, by the law of that state: *Lewis v. McCabe*, 49 Conn. 141; see "Insurance," *infra*.

INSURANCE. — A contract of insurance is made where the last act necessary to complete the contract is done: The principal case. This is frequently the issuance of the policy by the company. And therefore, when the agent of the company in another state forwards to the company at its home office an application for insurance made to him, for approval and the issuance of a policy, if nothing further remains to be done but the issuance of the policy, the contract is complete when the policy is issued and mailed, and therefore the contract will be governed by the law of the state where the home office is situated; and this is also true, though the policy is sent to the agent to be by him delivered to the insured: *Shattuck v. Mutual Life Ins. Co.*, 4 Cliff. 598; *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390; *Northampton Live Stock Ins. Co. v. Tuttle*, 40 N. J. L. 476; *Western v. Genessee Ins. Co.*, 12 N. Y. 258; but see *In re State of Pennsylvania Ins. Co.*, 22 Fed. Rep. 109. In *Northampton Live Stock Ins. Co. v. Tuttle*, 40 N. J. L. 476, Van Syckel, J., says: "Thatcher acted as the agent of the company, with authority to receive applications. He received the defendant's application, with the premium, which he transmitted to the company at its place of business in Pennsylvania. By the express terms of the receipt given by the agent to the defendant, the company had the option to approve the application and issue a policy, or to reject it and refund the premium. It was a mere proposition, from which the parties might have receded, and not a contract. Approval by the company was necessary to ripen it into a contract. Not until then did the minds of the parties come together, and invest the transaction with the attributes of a valid agreement. The contract of insurance must be regarded as having been made when the company approved the defendant's application, and issued and transmitted to him their policy; citing *Hyde v. Goodnow*, 3 N. Y. 266; *Huntley v. Merrill*, 32 Barb. 626. The contract must be held to have been made where the last act necessary to complete it was done. Although there is some conflict in the cases, I think the weight of authority is, that where the offer of the insured was accepted, and the policy deposited in the post-office by the company, properly addressed to the insured, the contract was made. It did not remain incomplete until the insured, by receiving the policy, was notified of the acceptance of his proposal." It is held, however, that a statute covering policies "delivered" in the state where it is enacted will govern a policy of insurance sent by the home office to the state agent for delivery to the insured: *Wall v. Equitable Life Assur. Soc.*, 32 Id. 273, citing *White v. Ins. Co.*, 4 Dill. 177; *Fletcher v. Ins. Co.*, 13 Fed. Rep. 526; S. C., 117 U. S. 519; 6 Sup. Ct. 837; *Erhman v. Ins. Co.*, 1 McCrary, 123; *In re State of Pennsylvania Ins. Co.*, 22 Fed. Rep. 109; *Paul v. Virginia*, 8 Wall. 168.

But where anything remains to be done by the agent in the state to which the policy is sent, except delivery, as where he is required to countersign the policy before delivery, this act of countersigning becomes the last act, and the contract is controlled by the laws of that state; and if, as in the principal case, the foreign corporation has not complied with the laws of that state, the policy will be void: *Northwestern Mut. Life Ins. Co. v. Elliott*, 7 Saw. 17; *Shattuck v. Mutual Life Ins. Co.*, 4 Cliff. 598; *Cromwell v. Royal Canadian Ins. Co.*, 49 Md. 366; *Heebner v. Eagle Ins. Co.*, 10 Gray, 131; *Todd v. State Ins. Co.*, 11 Phila. 355; see *Hyde v. Goodnow*, 3 N. Y. 266; *Huntley v. Merrill*, 32 Barb. 566; May on Insurance, sec. 66.

Where an agent of an English insurance company was authorized to make agreements to insure, such an agreement made by him in Scotland was a Scotch contract: *Albion F. & L. Ins. Co. v. Mills*, 3 App. Cas. 218; S. C., 1

Dow & C. 342; and where there was a correspondence relating to the insurance of a house against fire, the insurance company making known the terms upon which they were willing to insure, the contract was complete when the insured placed a letter in the post-office accepting the terms: *Taylor v. Merchants' Ins. Co.*, 9 How. 390.

FACTOR'S ADVANCES. — In the absence of contrary stipulation, a commission merchant's account for advances to a customer in another state, on consignments to be made, is governed by the law of the merchant's domicile: *Bush v. Nance*, 61 Miss. 237; *Ward v. Voeburg*, 31 Fed. Rep. 12; *Ovoldge v. Poor*, 15 Mass. 427; *Conseque v. Fanning*, 3 Johns. Ch. 587, 610; *Balkster v. Hamilton*, 3 La. Ann. 401; *Lanusee v. Barker*, 3 Wheat. 101, 146; *Grand v. Healey*, 3 Sum. 523; *Bayle v. Zacharie*, 6 Pet. 635, 643, 644.

NEGOTIABLE INSTRUMENTS. — Where notes are made in one state for delivery and negotiation in another, the law of the latter state governs the contract: *Commercial Bank v. Simpson*, 90 N. C. 467; *Strawbridge v. Robinson*, 5 Gilm. 470; S. C., 50 Am. Dec. 420; *Hart v. Wills*, 52 Iowa, 56; *Muhling v. Sattler*, 3 Met. (Ky.) 285; S. C., 77 Am. Dec. 172; *Bell v. Packard*, 69 Ma. 105; *Johnson v. Gautry*, 83 Mo. 339; *Providence etc. Bank v. Frost*, 14 Blatchf. 233. But see *Howenstein v. Barnes*, 5 Dill. 482. So where two persons sent their signatures from their residence to another state, with the intention that the blanks should be filled up into a promissory note, to be used in the place where the paper was sent, the court held that when perfected by the payee, and made payable in the latter place, the note was subject to the laws of that place: *Fant v. Miller*, 17 Gratt. 47; *Snath v. Mingay*, 1 Manle & S. 87.

Indorsements. — An indorsement of a note or bill is regarded as a new contract, and the rights and liabilities of an indorser are governed by the law of the place where the indorsement is made: *Dun v. Adams*, 1 Ala. 527; *Lowry v. Western Bank of Georgia*, 7 Id. 120; *Levy v. Cohen*, 4 Ga. 1; *Yeatsman v. Cullen*, 5 Blackf. 240; *Bank of Illinois v. Boudy*, 3 McLean, 268; *Holbrook v. Vibbard*, 3 Ill. 465; *Shanklin v. Cooper*, 8 Blackf. 41; *Hunt v. Standart*, 15 Ind. 33; S. C., 77 Am. Dec. 79; *Rose v. Pork Bank*, 20 Ind. 94; *Hyatt v. Bank of Kentucky*, 8 Bush, 193; *Powers v. Lynch*, 3 Mass. 77; *Williams v. Wade*, 1 Met. 82; *Cowperthwaite v. Sheffield*, 1 Sand. 416; *Aymar v. Sheldon*, 12 Wend. 439; *Nichols v. Porter*, 2 W. Va. 13. But indorsement implies a transfer, and if the indorsement is made in one state, and the delivery of the instrument is made in another, the law of the latter controls: *Stanford v. Pruett*, 27 Ga. 243; S. C., 73 Am. Dec. 734; *Gay v. Rainey*, 89 Ill. 221; *Briggs v. Latham*, 13 Pac. Rep. 393 (Kan.); *Young v. Harris*, 14 B. Mon. 556; S. C., 61 Am. Dec. 170; *Cook v. Litchfield*, 5 Sand. 330; *Stubbs v. Cott*, 30 Fed. Rep. 417; *Horne v. Rouquettis*, L. R. 3 Q. B. 514; *Edwards on Notes and Bills*, sec. 403; *Daniel on Negotiable Instruments*, sec. 868; 2 *Parsons on Bills and Notes*, 327.

In delivering the opinion of the court in *Briggs v. Latham*, 13 Pac. Rep. 393, 395-397 (Kan.), Johnson, J., says: "The only question presented for determination is, whether the indorsement of the notes by the defendant is an Illinois or a Missouri contract. The notes were never protested, nor did the defendant ever receive notice of their non-payment; and this was her defense. Under the laws of Illinois, no protest or notice was necessary to fix the liability of the defendant as indorser; but the laws of Missouri, like our own, require protest and notice. We think that the law of Missouri must control. The indorsement was written by the defendant upon the back of the notes, at her residence in Illinois, where she placed them in the hands of her husband for negotiation. This act did not operate to transfer the notes, nor did it

complete the contract of indorsement. . . . The mere circumstance that the defendant wrote her name on the notes in Illinois is therefore unimportant. They were placed in the hands of her husband to be negotiated and sold, not at any particular place, nor to any particular person, but were to be disposed of by him wherever and to whomsoever he could. He carried them to Missouri, where he sold and delivered them to Dunbar. Until that time, the notes were in the control of the defendant, and the transfer or contract of indorsement was not completed till then. The indorsement is a separate and substantive contract, and is not necessarily controlled either by the place of payment named in the notes, or by the residence of the indorser. The general rule is, that contracts of this character are to be construed, and their effect determined, according to the laws of the state in which they are made, unless it appears that they are to be performed in or according to the laws of another state. . . .

"Judge Story supposes a case where a negotiable bill of exchange is drawn in Massachusetts, on England, and is indorsed in New York, and again by the first indorsee in Pennsylvania, and by the second in Maryland, and the bill is dishonored, the law relating to damages in these states being different; and the inquiry is made, What rule is to govern in respect to damages? He says: 'The answer is, that in each case, the *lex loci contractus*. The drawer is liable on the bill according to the law of the place where the bill was drawn, and the successive indorsers are liable on the bill, according to the law of the place of their indorsement, every indorsement being treated as a new and substantive contract': Story's Conflict of Laws, sec. 314. . . .

"The plaintiff contends that the fact that the parties to the indorsement were all residents of the state of Illinois, and the circumstances under which the transfer was made in St. Louis take the case out of the general rule which we have been considering. It is urged that the parties were temporarily in Missouri, and being citizens of Illinois are presumed to have contracted with reference to the law of that state with which they were familiar, and not according to the laws of Missouri, where they happened to be. We are referred to the case of *Varant v. Arnold*, 31 Ga. 210, as an authority for this position. That was a case where the makers and indorsers of the note resided in Georgia, and the indorsements were made and delivered in Tennessee to the agents of the plaintiffs, who were residents of New York. It was claimed that it was a Tennessee contract; but the court ruled that it being known and understood that the indorsers resided in Georgia, and were in Tennessee for the sole purpose of effecting negotiations, and as a matter of convenience, and the plaintiffs' agent only happened to be in Tennessee at the time of the transfer, all the parties must be deemed to have contemplated Georgia as the place of performance, and to be governed by its laws. Our attention is also called to a case supposed by Mr. Daniels in his work on negotiable instruments, section 876, of a business transaction between a Virginian and a Kentuckian who were transiently in California, and that the former should accept the bill of the latter, payable in the future, but not expressly at any particular place, and he raises the question whether it would be deemed a Virginia or a California acceptance. He says: 'The criterion to apply would be, whether or not the acceptance was to be paid in California or in Virginia. If the Virginian were *in transitu*, — that is, merely there for a particular negotiation, or for convenience, or merely casually passing through the state, without any local business established there, — the single transaction would be governed by the law of his domicile, where it is presumed he would be, and where it is presumable he would discharge his obligation at

maturity; but otherwise the law of California would govern.' [See *infra*, "Acceptance."]

"Judge Story says that some jurists have adopted the opinion that, where a contract is made between foreigners belonging to the same country who are not domiciled, but are merely transient persons in the place where the contract is made, it ought to be governed by the laws of their own country. He then proceeds: 'Without undertaking to say that the exception may not be well founded in particular cases as to persons merely *in transitu*, it may unhesitatingly be said that nothing but the clearest intention on the part of the foreigners to act upon their own domestic law, in exclusion of the law of the place of contract, ought to change the application of the general rule': Story's Conflict of Laws, sec. 273.

"The facts of this case do not bring it within any of these or the other authorities cited by the plaintiff. It is true, the defendant and her husband, as well as Dunbar, to whom the notes were sold, were residents and citizens of Illinois; but there was nothing in the language of the indorsement, or in the circumstances of the case, to show that they contracted with reference to the laws of Illinois. L. D. Latham, husband and agent of the defendant, was a conductor on a railroad running into St. Louis, Missouri. That city was the end of his run, and was also his headquarters. Dunbar was also a passenger-conductor on a railroad, and his route was from Louisiana, Missouri, through Illinois to St. Louis, Missouri. His headquarters were in St. Louis, and he kept some of his valuable papers in a bank or safe deposit in that city. They met in St. Louis, the headquarters of both when not in charge of their trains, without any previous arrangement that they should so meet, and the notes were there transferred. They were not transiently in Missouri, nor did they go there for the sole purpose of making the contract, as was done in the Georgia case. Neither were they *in transitu*, or merely casually passing through the state of Missouri, without a business established there, like the case supposed by Mr. Daniels, and as stated by Judge Story: 'Nothing but the clearest intention on the part of foreigners to act upon their own domestic law, in exclusion of the law of the place of contract, ought to change the application of the general rule.' Much of their time was necessarily spent in St. Louis, and in fact that city may be said to have been their place of business. For several years before the transaction in question, they had been engaged as conductors on railroads running into St. Louis, and during all that time they maintained business headquarters there. In addition to this, Dunbar kept his valuable papers in St. Louis, instead of in Illinois, indicating that that was a place where at least some of his business was transacted. The contract of indorsement was actually made in Missouri; and under the circumstances mentioned, it cannot be said that it was made in contemplation of the Illinois law, or that the parties intended that it should be interpreted, and their liability determined, by the laws of a state, other than where the contract was entered into." And the judgment of the lower court was affirmed, all the justices concurring.

The contract of indorsement, however, is presumed to have been made at the time and place of the execution of the note: *Patterson v. Carrell*, 60 Ind. 128. But the indorser is liable for interest, under the law of the place on which the bill is drawn, or where the note is payable: See *Mullen v. Morris*, 2 Pa. St. 85; *Peck v. Mayo*, 14 Vt. 33.

Acceptance, like indorsement, is governed by the law of the place where it is made: *Allen v. Merchants' Bank*, 22 Wend. 215; *Commercial Bank v. Varnum*, 49 N. Y. 269; *Worcester Bank v. Wells*, 8 Met. 107; *Kelly v. Smith*, 1 Met. (Ky.) 313; *Webster v. Howe Machine Co.*, 8 Atl. Rep. 482 (Conn.); *Lewis*

v. *Owen*, 4 Barn. & Ald. 654; but see *Fraser v. Warfield*, 17 Miss. 220; or by the law of the domicile and place of business of the acceptor, if at the time of the acceptance he was temporarily in another state: *Frierson v. Galbraith*, 12 Lea, 129. An acceptance for the purpose of negotiation in another state, the bill being sent there for that purpose, is an acceptance in that state: *Tilden v. Blair*, 21 Wall. 246. But a promise to accept is governed by the laws of the state where made: *Scott v. Pilkington*, 15 Abb. Pr. 280.

MORTGAGE IN ONE STATE, AND NOTE PAYABLE IN ANOTHER. — Mortgage notes executed in Indiana, and secured by mortgage on lands in that state, the amount of the loan for which the notes were given being paid in that state, are Indiana notes, though the payee resided in New York, where some of the notes were payable; for the contracts are to be regarded as executed in Indiana, and to be governed by the laws of that state, and they are not void for usury under the laws of New York: *Thompson v. Edwards*, 85 Ind. 414, citing *Arnold v. Potter*, 22 Iowa, 194; *Chapman v. Robertson*, 6 Paige, 627; *Pine v. Smith*, 11 Gray, 38; *Bank v. Lewin*, 45 Barb. 340; *Levy v. Levy*, 78 Pa. St. 507; S. C., 21 Am. Rep. 35; *Fitch v. Remer*, 1 Biss. 337; *Philadelphia Loan Co. v. Towner*, 13 Conn. 249. To the same effect are *Joslin v. Miller*, 14 Neb. 91, and *Olmstead v. New England Mortgage Co.*, 11 Id. 493. In *Mills v. Wilson*, 88 Pa. St. 118, however, the facts were as follows: W., a resident of Kansas, wishing to secure a loan from M., a resident of Pennsylvania, executed in Kansas a bond and mortgage which specified no rate of interest or place of payment, and mailed this to H., a broker in Pennsylvania, who negotiated the loan, and acted as the agent of both W. and M. H. delivered the bond and mortgage to M., and secured the money. H. subsequently obtained a judgment against W. in Pennsylvania on a *scire facias* issued on the mortgage, which judgment included interest at the rate of seven per cent, the rate paid in Kansas. W. paid the judgment, but brought an action to recover the excess of interest over six per cent, the legal rate in Pennsylvania. And the court held that this was a Pennsylvania contract, and that W. was entitled to recover: See also *Oregon etc. Trust Co. v. Rathbun*, 5 Saw. 32. The validity of the mortgage will, of course, be determined by the law of the state where the mortgaged land is situated: Id.

COMMON CARRIER. — The law of the place where goods are received by a carrier, under a contract for their transportation to another state, must govern in determining whether the carrier can limit his common-law liability by notice: *Hale v. New Jersey S. N. Co.*, 15 Conn. 539; S. C., 39 Am. Dec. 398. But when a contract is made by a common carrier in one state to transport goods from that state into another, and the goods are lost, the rights of the parties are governed by the law of the state in which the loss happens: *Gray v. Jackson*, 51 N. H. 9. And so the law of the place of final performance of the carrier's contract governs in regard to the delivery of the goods: *Faulkner v. Hart*, 44 N. Y. Super. Ct. 470.

TELEGRAPH CONTRACTS. — The Indiana statute, which gives the right to recover a penalty to one injured by an incorrect transmission of a telegraph message, has no application to a contract made in another state to send a message from that state to Indiana: *Carnahan v. Western Union Telegraph Co.*, 89 Ind. 526; S. C., 46 Am. Rep. 175.

CONTRACT OF INSURANCE, WHEN COMPLETE: See *Keim v. Home Mutual Ins. Co.*, 97 Am. Dec. 291, and note 295.

CONTRACT IS GOVERNED BY LAW OF PLACE WHERE MADE, unless it is to be performed at another place: *Lewis v. Headley*, 87 Am. Dec. 227, and note 230; *Kennedy v. Knight*, 94 Id. 543, and note 547.

KENTON INS. CO. v. SHEA AND O'CONNELL.

[6 BUSH, 174.]

NOTICE OF PREVIOUS INSURANCE NEED NOT BE IN WRITING, where the condition in the policy does not require it, though it prescribes that the assent of the company shall be in writing.

DELIVERY OF WRITTEN POLICY AFTER LEGAL PAROL NOTICE OF PRIOR INSURANCE constitutes a written assent to such prior insurance, without the unnecessary act of assenting thereto by another writing.

NOTICE OF PRIOR INSURANCE MAY BE ESTABLISHED BY PAROL, where the policy does not require it to be in writing.

NOTICE OF PRIOR INSURANCE SUFFICIENTLY APPEARS, in case of a policy not requiring it to be in writing, where the assured applied for additional insurance to the same agent who had made the existing insurance, and upon the same day; and he agreed to the further insurance, and that it should be placed with the other company for which he was agent, and made out and placed his own signature to the policy, and caused it to be delivered the next day; and then, in his usual course of business, notified his constituent of this additional insurance, and of the prior one, which was never disapproved by it, though this was sixty-nine days before the loss occurred.

REQUIREMENT THAT ASSENT TO PRIOR INSURANCE SHALL BE INDORSED UPON the policy, or otherwise appear by writing, may be waived.

PEDULIAR AND PRIVATE INSTRUCTION GIVEN TO AGENT OF INSURANCE COMPANY, and not made public, will not justify a refusal by the company to pay the policy.

INSURANCE COMPANIES ARE BOUND FOR ACTS OF AGENTS not prohibited by their charters, and within the limits which may reasonably be presumed by the public, from the character of the business and the general manner of transacting it.

ACTION on policy of insurance. The opinion states the case.

William Atwood, and John F. and Charles H. Fisk, for the appellant.

Muir and Bijur, for the appellees.

By Court, WILLIAMS, C. J. George S. Moore was the agent at Louisville for both the United Life, Fire, and Marine Insurance Company and appellant. James M. Moore was the father and clerk of G. S. Moore, the agent.

Appellees obtained through this office, and from the father, a policy on their stock of goods, November 15, 1867, which was delivered to them by Gray, another clerk, from the United Life, Fire, and Marine company, which, however, was issued by the approbation of George S. Moore, the agent.

On the same day, and after said insurance, appellees applied to said G. S. Moore for an additional insurance to the amount of five thousand dollars, to which said agent agreed,

and placed it to the Kenton Insurance Company, and issued and delivered a policy the next day; but the assent of this latter company to said previous insurance was not indorsed and signed on the policy; the weight of evidence, however, establishes that said agent reported said previous insurance to his principals, and that they did not disapprove it.

January 23d following, the stock was greatly damaged by fire, and the apportioned assessment on appellant was over four thousand dollars, which, on suit, was adjudged to appellees, and of which the insurance company complains,—1. Because the assured had given no notice in writing of the previous insurance; 2. Because no signed indorsement of assent to such was placed on the policy.

The policy contains this clause: "If there is or shall hereafter be made any other insurance on the property hereby insured, or any part thereof, without being notified to this company, and its consent thereto written hereon, then in either case this policy shall be of no binding force on this company as part of this contract. Notice of all previous insurances upon property insured by this company, or upon any part thereof, shall be given to them and indorsed on this policy, or otherwise assented to in writing by the company, at or before the time of their making insurance thereon; otherwise the policy subscribed by this company shall be of no effect."

It will be observed that this covenant does not require that the notice that a previous insurance had been made should be in writing, but only that the assent of the company should so appear.

No more certain and comprehensive notice of a previous insurance could possibly appear than does in this case, for the application for additional insurance was made the same day to the same agent who had made the existing one; and he agreed to the further insurance, and that it should be placed to his other constituent, and made out and placed his own signature to the policy, and caused it to be delivered the next day; and then in his usual course of business notified his constituent of this additional insurance, and of the prior one, which had never been disapproved by it, though this was sixty-nine days before the loss occurred.

It is said by appellees that the delivery of the policy was the written assent of the company to the previous insurance; and there is much force in this argument, which would be conclusive but for the concluding words of the sentence, pro-

viding that the assent should be indorsed on the policy, or else assented to in writing, otherwise the policy shall be of no effect, which seems to indicate that it contemplated some other writing than the policy alone; still the delivery of a written policy, after such notice of a prior insurance, would attest in writing such assent with as much force as could any other writing, except that the notice itself would then be evidenced by a writing which is not required by the covenant.

If the party establish a legal parol notice, then a delivery of a policy after such notice should doubtless be considered a written assent, without the unnecessary act of assenting thereto by another writing; indeed, such evidence of assent might be due to the assured for his own protection, and therefore the duty of the company, on his demand, to execute it.

There can be but little doubt that this notice of prior insurance may be established by parol, especially under the covenants of this policy.

But even if the policy should not be deemed the written assent, still the requirement that the assent should be indorsed on the policy or otherwise by writing may be waived, as has frequently been determined.

In *National Fire Ins. Co. v. Crane*, 16 Md. 260, the court of last resort in Maryland held that where a prior insurance was notified to the company at the time the policy issued, the want of indorsement of such insurance on the policy, as required by a condition of the policy, cannot be urged in a court of equity in a cause otherwise free from objections, whatever effect it may have at law.

In *Liddle v. Market Fire Ins. Co.*, 4 Bosw. 179, where the policy provided that if, at the time of removal, the risk had been increased, and the insured failed to give notice thereof in writing, such policy and renewal should be void; and at the time of the last renewal the assured made known the fact of the existence of the bakery to the secretary of the company, but it was not indorsed on the policy, or otherwise communicated in writing,—it was held that the company, by renewing the policy after such notice, waived a strict compliance with the condition requiring such communication to be in writing, and that in any event the company were estopped from setting up their increased risk in bar of the action.

In *Atlantic Ins. Co. v. Goodhull*, 35 N. H. 328, where a policy contained a condition which provided that it should be void if other insurance should not be indorsed on it, held that the

existence of prior insurance did not make it absolutely void, but invalid, voidable, and capable of being confirmed and made valid by acts of the company showing a waiver of the defect.

It is true that the Massachusetts courts have held otherwise; but we think authority and analogy and reason and justice preponderate against their decisions, which may have been made, however, on the peculiar charter provisions of the companies under their review, or upon some statute or other law peculiar to that state.

Nor can the appellants justify their refusal of payment by any peculiar and private instruction given to their agent and not made public, though they may confine his powers within narrower limits than may fairly be presumed from the manner of his being held out to the public, and which is not prohibited by the charter. Many authorities might here be cited, but it is not necessary.

The agency of Moore was general, though local, and he was even intrusted with the delivery of policies without having first submitted the proposal to insure to the home company, which is a more unlimited power than is frequently intrusted to even general agents without a circumscribed locality.

It may be remarked that the Massachusetts and Canadian authorities seem to militate against this reasonable and just doctrine, perhaps for the reasons assigned; but if not for these, still, as we do not perceive the cogency of their reasoning nor the justness of the principles by which they are governed, we shall be guided by the more equitable, liberal, and enlightened rules announced by other sister states, which hold the companies bound for the acts of their agents not prohibited by their charters, and within the limits which may reasonably be presumed by the public from the character of the business and general manner of transacting it.

Besides, here it may be fairly presumed that the home company not only had notice of this additional insurance from their agent Moore, but that they had also received a portion of the premium before this loss, and had not up to that time dissented from their agent's acts, nor made any move to have the policy canceled.

Under all the peculiar circumstances of this case, we cannot doubt that the evidence, the equity, and law of the case all conspire to fix appellant's liability, and that the judgment against them was essentially right; wherefore it is affirmed

with damages, an appeal and *superedeas* bond appearing herein.

INSURANCE COMPANY IS BOUND BY ACTS OF AGENT WITHIN SCOPE OF HIS AUTHORITY: *Cumbe v. Hannibal Savings & Ins. Co.*, 97 Am. Dec. 333, and note 396; even though he violates limitations upon that authority which are not brought home to the knowledge of the party with whom he deals: *Viele v. Germania Ins. Co.*, 96 Id. 88, and note 111, 112; see *Bartholomew v. Merchants' Ins. Co.*, 96 Id. 65.

INSURANCE COMPANY MAY WAIVE CONDITIONS OF POLICY WHICH ARE FOR COMPANY'S OWN BENEFIT: *Viele v. Germania Ins. Co.*, 96 Am. Dec. 83, and note 111; such as that involved in the principal case: *Howie v. Equitable M. I. Co.*, 93 Id. 321.

CONDITIONS IN INSURANCE POLICIES REQUIRING NOTICE OF OTHER INSURANCE, and the company's consent thereto indorsed on the policy: See an extended note on this subject appended to *Hutchinson v. Western Ins. Co.*, 64 Am. Dec. 221; *Barb's Ins. Co. v. Robinson*, 94 Id. 65, and note 74.

MACKLIN'S EXECUTOR v. CRUTCHER.

[6 BUSH, 401.]

TO BIND PARTNER BY NOTE DRAWN BY COPARTNER IN HIS OWN NAME, it must appear that such name was the style of the firm.

PARTNER IS EXONERATED, IF INDIVIDUAL NOTE OF COPARTNER is accepted as a merger and discharge of the partnership liability.

PARTNER IS NOT LIABLE UPON INDIVIDUAL NOTE OF COPARTNER given upon the purchase of goods for the use of the firm; though he may be liable upon the implied contract, unless the note was accepted in discharge of the partnership liability.

ACTION upon promissory notes. The opinion states the case.

T. N. and D. W. Lindsey, for the appellant.

John Rodman, for the appellee.

By Court, ROBERTSON, J. For several years previous and subsequent to the year 1860, A. W. Macklin and W. T. Ferguson were partners in the culture of cotton on a plantation called Boggy Bayou, in Chicot County, Arkansas, — Macklin residing in Franklin County, Kentucky, and Ferguson on the partnership land, acting as the superintending manager of the planting concern. In February of that year, Ferguson bought five mules and a black horse for \$810, and also one black mule for \$175, avowing that he bought for the use of the plantation, executing his individual note, signed W. T. Fer-

guson. The facts conduce to show that the stock so bought was used in the service of the partnership.

In February, 1866, both Ferguson and Macklin having in the mean time died, this action was brought against Macklin's executor on both notes. The petition alleged that the consideration of the notes was work-stock for the firm; that it was employed for the benefit of the firm; and that the firm name was W. T. Ferguson. The answer traversed all these allegations; and on a comprehensive issue, the jury found against the executor on both notes, and the court, overruling a motion for a new trial, confirmed the verdict by its judgment.

The testimony might have authorized the deduction that the stock for which the notes were given was bought for and applied to the use of the partnership; and on that hypothesis, Macklin was bound by the purchase. But there was no pretense for the controverted allegation that W. T. Ferguson was the style of the firm; on the contrary, the proof is conclusive that it was Macklin and Ferguson, so understood and so used in all partnership transactions, and that Ferguson signed his own name only in his own independent transactions. It also appears that he sometimes bought and sold mules on his own account, and for his own exclusive benefit. Nor is there any evidence that Macklin ever authorized Ferguson to bind him otherwise than in the firm name, or ratified the notes in this case as his, or as such obligatory on him.

Then, assuming that Ferguson bought the stock for the firm, and applied it to that use, and conceding that, according to reason and authority, Macklin was bound by the oral contract, still the decisive question remains, Is he bound also by the notes to which he was no party, and which do not purport to bind him or his firm? If Ferguson's notes as an individual were accepted as a merger of the partnership liability, Macklin was thereby exonerated; and if not so excepted, and Macklin was still liable for the consideration, how and why is he liable in this action on the notes which do not purport any obligation on the firm of Macklin and Ferguson? Had the notes, as signed, purported to have been for and by a firm, an error in the style of the firm would not have exonerated Macklin on proof that, even though not named, he was one of the firm intended, because that proof disclosed him as a member of the firm intended, and thereby made him a party. This principle was recognised by this court in the case of *Kinsman v. Dallah*, 5 Mon. 885; or had Macklin been a dormant part-

ner, and Ferguson been the only overt partner, doing their business in the name of W. T. Ferguson, proof that Macklin was a secret copartner would have made him a party to the note. This also was adjudged by this court in the manuscript opinion in the case of *Hickman v. McGee*.

But here there was neither dormancy nor any other partnership name than the well-known and accustomed name of Macklin and Ferguson. The reason of these adjudged cases, therefore, does not apply to this case, but implies that the notes as signed were not by any firm, nor in any way binding on Macklin as written obligations. The case of *Hykes v. Crawford*, 4 Bush, 19, is the only case in this court that squints the other way. In that case, Crawford and Long, being liable as partners, Long gave his individual note, with Hykes as surety, for the debt; and Hykes, having satisfied the judgment against Long and himself on that note, was adjudged to be entitled to restitution from Crawford as well as Long. But in reasoning on the subject, although it may have been immaterial to Crawford's liability for contribution whether he was bound by the note or only for the original debt which the surety paid, yet the court, instead of saying that he was originally bound by the consideration, said that he was bound by the note given for it by his partner. It does not appear that Long's signature did not import the partnership firm. Had it appeared otherwise, the suggestion alluded to would have been an *obiter* inadvertence which could not be recognized as authority. As it seems to us, such recognition would confound causes of action, and disturb the harmony of scientific jurisprudence.

But Smith, in the third edition of his Commercial Law by Holcomb and Gholson, page 81, cites and approves the case of *Kirk v. Blinton*, 9 Mees. & W. 284, in which it was, in effect, adjudged in England that, to bind a partner by a note drawn by another partner in his own name, it must appear that such was the style of the firm. And this appears to us to be the true doctrine, uncontrolled by any other accredited or consistent and well-considered authority.

The result is, that, unless Ferguson's notes discharged Macklin, an action might have been maintained against him or his executor on his parol liability, implied by his partner's purchase for the use of the firm, but that this action on the notes must fail because he was not bound by the notes as such. The circuit court misinstructed the jury to the contrary.

Wherefore the judgment is reversed, and the cause remanded for a new trial.

PARTNER IS ALONE LIABLE ON ALL CONTRACTS MADE BY HIMSELF upon his own exclusive credit, and even though the partnership obtain the benefit of the contract, it will not be liable; though if there is a dormant partner, the rule is otherwise: *North Pennsylvania Coal Co.'s Appeal*, 84 Am. Dec. 487; *Richardson v. Farmer*, 88 Id. 129. See also, upon the right of a partner to bind the firm by a negotiable instrument drawn in the firm name, *Miller v. Consolidation Bank*, 88 Id. 475, and note 477.

SEATON AND BRODERICK v. MARSHALL.

[6 BUSH, 429.]

EXEMPTION STATUTES APPLY ONLY TO CASE OF HOUSEKEEPER WITH FAMILY; and the family contemplated are those who reside with or compose the household of the debtor.

HORSE OF PRACTISING PHYSICIAN IS EXEMPT FROM EXECUTION, where he was a widower with two daughters of tender age, whom he kept in the care of his mother, providing for them, and sending one of them to school from his mother's house, while he himself occupied a single room, about one mile distant, as an office and dwelling, without servants or other family than his children, who were sometimes with him at his office, where he lodged, cooked, and ate his meals; for the children, though for the time being in the immediate care of his mother, were domiciled with him, and he was therefore a housekeeper having a family residing with him.

ACTION to recover the value of a horse sold under execution. The opinion states the case.

Hickman and Campbell, for the appellants.

Thomas J. Throop, for the appellee.

By Court, HARDIN, J. This appeal seeks the reversal of a judgment for one hundred dollars, recovered by the appellee for the value of a horse, which the appellants caused to be levied on and sold under an execution against the appellee, and which he claimed as exempt from execution.

The provisions of the statute exempting the property of a debtor from sale under execution have been decided to apply only to the case of a housekeeper with a family: *Gunn v. Gudehus*, 15 B. Mon. 447; and we think the family contemplated are those who reside with or compose the household of the debtor.

It was proved on the trial that the plaintiff, who was a practicing physician, and used the horse, the only one he owned, as a riding-horse, was a widower with two daughters of tender age, whom he kept in the care of his mother, providing for them, and sending one of them to school from his

mother's house, while he himself occupied a single room, about one mile distant, as an office and dwelling, without servants or other family than his children, who were sometimes with him at his office, where he lodged and cooked and ate his meals. Was he a housekeeper in the meaning of the statute referred to, with a family residing with him? Poorly provided as he seems to have been for housekeeping, we do not doubt that in legal contemplation he was a housekeeper. But had he a family residing with him? His children being infants and subject to his control, and not appearing to have had any permanent home elsewhere than with him, their domicile was with him, although their sex and tender age, together with their father's situation, seem to have caused him, very properly, to place them for the time being in the immediate care of his mother; and this partial separation from him did not, in our opinion, change their place of residence.

We are of the opinion, therefore, that the horse was exempt from sale under the execution, and the circuit court rightly so adjudged.

Wherefore the judgment is affirmed.

WHO IS HEAD OF FAMILY, AND WHAT CONSTITUTES FAMILY: See *McMurray v. Shuck*, *ante*, p. 662, and note collecting the prior cases. This case and the principal case are cited to the same point in *Connaughton v. Sands*, 32 Wis. 392; see note to *McMurray v. Shuck*, *ante*, p. 662. The principal case is also cited to the point that "the man who has a wife and child dependent on him for support is the head of a family, though they do not reside under the same roof. This wife and child, not appearing to have any permanent home elsewhere than with the plaintiff's relator, their domicile was with him, though there may have been a temporary separation for economical or other causes": *State v. Finn*, 8 Mo. App. 264. The domicile of the husband controls that of the wife, and regulates the rights of the wife and children under the homestead act: *Succession of Christie*, 96 Am. Dec. 411, and note upon "Homestead Rights of Non-resident Widow."

CAWEIN v. BROWINSKI.

[6 BUSH, 407.]

WHEN OR IN WHAT TIME HOLDER OF CHECK IS LEGALLY BOUND TO PRESENT IT for payment, in order to hold the drawer responsible for non-payment, is a question of law.

PRESENTMENT OF CHECK ON DAY AFTER IT IS DRAWN, DURING BANKING HOURS, is sufficient to charge the drawer, though the holder received it during banking hours of the day it was drawn, and could have presented it on that day.

ACTION upon a check. The opinion states the case.

Robert J. Elliott, for the appellant.

Bodley and Simrall, for the appellee.

By Court, PETERS, J. In the city of Louisville, on the twenty-first day of December, 1868, appellant drew his check on Tucker & Co., bankers in said city, for three hundred dollars in current funds, payable to appellee or order in satisfaction of a debt the former owed the latter.

On the day after said check was drawn, it was taken to the house of Tucker & Co. by appellee, to demand and receive payment thereof; but the house, during the whole of that day, was closed, and never has been opened by them as a business house since, they having become insolvent, and having taken the benefit of the bankrupt law.

This action was then brought by the holder against the drawer of said check, for the amount thereof; and a jury having found a verdict in favor of the plaintiff below, and a judgment having been rendered thereon, this appeal is prosecuted to reverse that judgment.

The following material facts are established incontrovertibly, some by the agreement of the parties and some by proof: That the drawer of the check on the day of its date had funds in the bank more than sufficient to pay it, and subject to his order; that all checks on said bank presented on that day were promptly paid; that the one which is the subject of this controversy was drawn not later than half-past twelve o'clock, P. M., of the day, during banking hours; that the bank closed at three o'clock, P. M.; that the drawer and payee of the check resided in said city, and the holder could have presented it at said bank for payment on the day it was drawn, during banking hours; and it may be assumed that if it had been presented on that day, it would have been paid, but on that evening the bank closed in ruins, and never has been nor will ever be opened again to honor checks or satisfy creditors.

1. On the trial, the court below, on behalf of appellee, instructed the jury substantially that if they believed from the evidence that defendant gave the check to plaintiff in payment of a debt during banking hours, and after twelve o'clock on the 21st of December, 1868, and Tucker & Co. failed on that day, and on the next day the house was not opened, but was

labeled closed early in the morning, and remained closed ever afterward, and during business hours of the said day, — viz., the 22d of December, 1868, — either partner of Cawein & Co. was notified of the dishonor of the check and refused to take it up, they must find for plaintiff three hundred dollars, and interest.

2. Plaintiff was not bound to present the check for payment until the day after it was drawn, and if the banking and business house of Tucker & Co. was then closed on account of bankruptcy, and have made no payments since said last-named day, even if defendant had no notice of the dishonor of said check, and the jury believe he sustained no damage by reason of the failure to give such notice, they must find for plaintiff; and refused to give the following instructions asked by appellant: That if the jury believed from the evidence that at the time the check was drawn Cawein & Co. had the amount thereof on deposit to their credit in said house of Tucker & Co., that the giving said check transferred to plaintiff the exclusive right to the fund, and if he failed to present the check for payment within a reasonable time after it was given, they must find for the defendant; and that it is the province of the jury to determine from the proof what is or was reasonable time.

Whether the court below erred in granting the instructions asked by appellee, and in refusing those asked by appellant, is the principal question involved. When or in what time appellee was legally bound to present the check for payment, in order to hold the drawer responsible in case of non-payment, must be a question of law, and consequently that portion of the instruction asked by appellant by which the jury were to be made the sole judges of that question was properly refused; and we proceed now to inquire whether, by delaying to present the check until the day after it was drawn, appellee thereby lost his remedy against appellant.

We are not aware that this question has been heretofore expressly decided by this court. In *Piner v. Clary*, 17 B. Mon. 645, Clary held a certificate of deposit of the People's Bank, located in Cincinnati, which he, on Saturday, the 14th of October, 1851, indorsed to Piner, both living in Newport, Kentucky. On the 16th of the same month, the certificate of deposit was presented to the bank, and payment demanded of the bank. A promise was made to pay it in the course of the day, but it was not paid. The bank continued to do business

the next day, and then closed indefinitely. The owner of the bank made an assignment of his effects, and left for parts unknown.

On the twenty-first day of the same month, the certificate was presented at the banking-house of Manchester, who had been the owner of the bank which was then closed, and protested for non-payment. Notice was not given to Clary of the dishonor of the bill until some days after the bank had failed. In that case this court held that, as Newport and Cincinnati, although in different states, are in close juxtaposition, and only separated by the Ohio River, payment of the certificate of deposit should have been demanded on the first day of business next following the day it was received by the holder, it having been transferred on that day to him after banking hours, as it was payable immediately on presentment without days of grace; but whether, if the certificate of deposit had been transferred during banking hours, the holder would not have been required to present it on the day it was drawn is not decided.

In *Smith v. Jones*, 2 Bush, 103, this court held that a check, unlike a bill of exchange, does not require "due diligence," and apparent laches in presenting it for payment does not exonerate the drawer, unless by unreasonable delay he has suffered loss, and then he is entitled to relief *pro tanto*; but what would be unreasonable delay is not there defined.

In Chitty on Bills, 274, 275, side page, it is said, with respect to a check on a banker, it is now settled that it suffices to present it for payment to the banker at any time during banking hours on the day after it is received, and no laches can be imputed to the holder in not presenting it for payment in the morning of the second day, although the bankers paid drafts on them until the afternoon, and then stopped payment.

In Story on Promissory Notes, section 492, it is said, if the payee or holder of a check receives it immediately from the drawer in the same town or city where it is payable, he is bound to present it for payment to the bank or bankers at farthest on the next succeeding secular day after it is received, before the close of the usual banking hours. He may, however, although he is not bound to do so, present it for payment on the same day on which it is drawn or delivered to him, but he is at liberty to wait until the next succeeding day.

In 2 Parsons on Notes and Bills, 72, it is said in "most cases it is held that a check should be presented the day after it is received." According to the authorities, therefore, it was suf-

sufficient to charge the drawer to present the check the day after it was drawn, and the court below properly instructed the jury to that effect.

In *Piner v. Clary*, *supra*, protest of the check and due notice thereof was decided to be necessary to charge the drawer, because it was drawn in Kentucky, and made payable in Ohio. The instrument, therefore, was placed on the footing of a foreign bill of exchange, and the rights and duties of the parties depended on the law regulating such instruments.

As, therefore, there was no error in the instructions given, nor in overruling those asked by appellant, and the verdict of the jury is sustained by the evidence, the judgment is affirmed.

HOLDER OF CHECK SHOULD PRESENT IT BEFORE EXPIRATION OF NEXT BUSINESS DAY after it is received: *Strong v. King*, 85 Am. Dec. 336, and note 342.

WEBBER v. MINOR.

[6 BUSH, 403.]

SELLER, UPON REFUSAL OF PURCHASER TO RECEIVE AND PAY FOR GOODS SOLD, may keep the goods and recover by proper action the difference between their value at the time and place of delivery and the contract price; or he may sell them with due precaution and diligence, and then sue for and recover the difference between the price received and the contract price; or he may, upon making an actual or constructive delivery of the goods, recover the full contract price.

READINESS OF AND OFFER BY SELLER TO DELIVER GOODS SOLD, and refusal of the purchaser to receive them, do not constitute actual or constructive delivery, so as to entitle the seller to recover the full contract price.

TO CONSTITUTE CONSTRUCTIVE DELIVERY OF WOOD SOLD, so as to entitle the seller to recover the contract price, he should set it apart for the purchaser, and relinquish his own control of it, at or as near to the place of delivery as is reasonably practicable.

ACTION to recover the price of wood sold. The opinion states the case.

O. F. Stirman, for the appellant.

Coke and Arbogust, for the appellee.

By Court, **HARDIN, J.** The appellee brought this action to recover of the appellant the sum of \$669.90, as the balance of the price of 200 cords of wood, which the plaintiff alleged he sold the defendant, at \$4.35 per cord, and was to haul and deliver at the brick-yard of the defendant. He further al-

leged the delivery of 46 cords of the wood, which were received; and "that he afterward tendered and offered to deliver to defendant, at the brick-yard of defendant, the remaining 154 cords of wood, which he refused and still refuses to accept or receive."

Admitting the payment of \$200.10, the petition sought a recovery as aforesaid of the residue of the stipulated price of the wood.

A demurrer of the defendant to the petition was overruled, and he filed an answer controverting the averments of the petition, except as to the sale of said forty-six cords of wood, and payment therefor.

A trial resulted in a verdict and judgment for the sum claimed in the petition; and the court having refused to grant the defendant a new trial, he has appealed to this court.

The main and controlling question in the case, and which involves the correctness of the action of the court in both overruling the defendant's demurrer to the petition and in instructing the jury, is, whether the tender and offer to deliver the 154 cords of wood at the brick-yard, without actual delivery, was such a performance of the contract on the part of the plaintiff as to entitle him to recover, not merely damages for the failure to accept and pay for the wood, but the entire contract price of it?

According to the case of *Cook v. Brandeis*, 3 Met. (Ky.) 555, relied on for the appellee, and the authorities therein cited, the appellee might, on the refusal of the appellant to receive and pay for the wood, if he was bound to do so by the contract, have either kept the wood, and recovered by proper action the difference between its value at the time and place of delivery and the contract price; or he might have sold it with due precaution and diligence, and then have sued for and recovered the difference between the price received and the contract price; or he might, upon making an actual or constructive delivery of the wood, have recovered the full contract price, the measure of relief sought in this action.

But although the evidence conduces to sustain the plaintiff's averments of the contract, and his readiness and offer to deliver the 154 cords of wood, and the refusal of the defendants to receive it, these facts do not in our opinion constitute, actually or constructively, a complete performance of the contract. For conceding that a substantial compliance with his undertaking did not require that he should place the

wood upon the brick-yard against the will of the defendant, he should have set it apart for the defendant, and relinquished his own control of it, at or as near to the place of delivery as was reasonably practicable. This would have been a constructive delivery of the wood, not merely an offer or tender of delivery: *Duckham v. Smith*, 5 T. B. Mon. 372; 2 Story on Contracts, sec. 800. And as there would have remained nothing more for the plaintiff to do to vest the property in the defendant and render the sale absolute, he might then have recovered the contract price of the wood. But he was not entitled to a recovery to that extent upon the allegation and proof only of a tender or offer of delivery, which, if true, neither divested him of the legal title nor the possession of the wood.

Wherefore the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

CONTRACT OF SALE WHEN COMPLETE: See *Barker v. Mann*, 96 Am. Dec. 373, and note 378; *Cleveland v. Williams*, 94 Id. 274.

REMEDY OF SELLER WHERE GOODS ARE NOT DELIVERED: See *Atwood v. Lucas*, 89 Am. Dec. 713, and note 715; *Patten's Appeal*, 84 Id. 479.

CONSTRUCTIVE DELIVERY: See *Atwell v. Miller*, 61 Am. Dec. 294, and note 299.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY v. FILBERN'S ADMINISTRATRIX.

[6 BUSH, 574.]

RAILROAD COMPANY IS NOT REQUIRED TO PROVIDE AGAINST ALL SUCH UNFORESEEN ACCIDENTS or misfortunes as could not be averted by the utmost care and diligence; and it is misleading and erroneous to instruct, in an action for causing the death of an engineer who was killed by a dead tree falling across the track, that it was the duty of the corporation to keep the road free from all objects and obstructions which might imperil the safe transit of trains.

IMPLIED UNDERTAKING OF EMPLOYEES IN SAME SERVICE TO RISK CONTINGENCIES which the ordinary skill and care of each, in his line of service, could not avert, does not exonerate railroad company from liability for damages resulting to one of such co-agents from the extraordinary or gross negligence of another of them.

RAILROAD COMPANY IS LIABLE FOR DEATH OF ENGINEER, if the section boss or some other agent of the company than the engineer was alone guilty of willful negligence causing the death, notwithstanding, in his own sphere, the engineer may have been guilty of some neglect of duty.

WILLFUL NEGLECT MUST INVOLVE EITHER INTENTIONAL WRONG, OR SUCH RECKLESS DISREGARD of security and right as to imply bad faith; and

it is erroneous to so instruct, in an action for the death of an engineer caused by a dead tree falling across the track, as to make the question of willful negligence depend on the knowledge or belief of the road-master, or section boss, as to whether the tree was decayed and subject to fall or be blown across the track, and his failure, though so apprised, to remove it; for though these are facts from which the jury might infer willful neglect, they do not necessarily constitute it.

ACTION for damages. The opinion states the case.

I. & J. Caldwell, for the appellant.

E. S. Worthington, and Bunch and Young, for the appellee.

By Court, **HARDIN, J.** During a storm, which occurred on the night of the 16th of March, 1868, a dead and partially decayed oak-tree, which stood on the road-bed and near the track of the Louisville and Nashville railroad, fell across the track, by which the engine of an express train, on its way from Nashville to Louisville, was thrown from the track, and Thomas Filbern, the engineer, was instantly killed.

The widow of Filbern, having become his administratrix, brought this action against the railroad company for the recovery of punitive damages, under the provisions of "An act for the redress of injuries arising from the neglect or misconduct of railroad companies, and others": 2 R. S. 510; the petition alleging, in substance, that the life of the plaintiff's intestate was lost in consequence of the willful neglect of the defendant in failing theretofore to remove the tree.

The answer of the defendant controverted the allegations of the petition importing the charge of willful neglect; and also set forth, as a defense, that said Thomas Filbern, by his own neglect and want of care as an engineer in the service of the defendant, contributed to and caused the accident which was the immediate cause of his death.

A trial of the case resulted in a verdict and judgment for the plaintiff for ten thousand dollars, and the court having refused to grant the defendant a new trial, it has appealed to this court.

Of the evidence, it may suffice to say that, from the dead and decaying condition of said tree, and its proximity to the road, there had long been such apparent danger of its falling on the track, and thus imperiling the lives of passengers and employees on the road, as to require its removal; and therefore negligence, in some degree, was implied by the failure of the officers and agents of the corporation to remove

it; and moreover, the attention of the section boss, an officer subordinate to an engineer, and subject to his orders, had been drawn to the necessity of removing the tree but recently before the disaster; yet the danger and consequent necessity of removing the tree might have been observed by Filbern as well as by other employees engaged in running trains on the road; and if they were, it was his duty to cause the removal of the tree, or report the necessity of doing so to some superior officer.

The questions presented for the decision of this court, so far as deemed essential, involve the action of the court below in relation to instructions to the jury. Rejecting several instructions asked by each party, the court, of its own motion, instructed the jury, in substance, that it was the duty of the corporation to keep the road free from all objects and obstructions which might imperil the safe transit of trains; and that duty rested on all its agents engaged upon the road in the transit of trains, and especially on the road-master and his subordinates, the section bosses; and if the jury believed from the evidence that either of these knew or was notified that said tree was decayed, and from its condition subject to fall or be blown down across the road, and thus imperil the safe transit of trains, and was so apprised long enough to have removed the peril, and failed to do so, such failure was willful neglect, within the meaning of the statute. And if the jury further believed from the evidence that the death of Filbern was caused by such neglect, and that he could not, by the use of ordinary care and diligence on his part, as an employee of the defendant, have avoided the consequences of such neglect, the law was for the plaintiff, and they should so find. If, however, Filbern, as engineer or employee of the defendant, by the use of ordinary care and diligence on his part, could have avoided the consequences of said neglect, and failed to do so, then the jury should find for the defendant.

These expositions of the law of the case are questioned, by the argument for the appellant, as erroneous and misleading, and we think rightly so. By the definition given by the court of the duty of the corporation as to objects and obstructions which might imperil the transit of trains, and the responsibility arising from the failure of the agents of the corporation to remove such causes of danger, the jury were, in effect, told that, ordinarily, the defendant was not only liable for negligence, either proximate or remote, but that they must regard

all accidents or misfortunes occurring in consequence of the falling or displacement of natural objects along the line of the road as the results of such negligence; and especially so if the objects were such as could have been removed, whether trees not apparently dangerous, or masses of stone or embankments which might fall upon the track, but probably never would.

From the nature of the country through which the appellant's road passes, and the great expense, if not the impossibility, of rendering its track entirely secure from liability to accidental obstructions, it could not be expected that every possible cause of danger could be removed. And while, in the running operations of the road, the law exacts of the corporation a degree of care and vigilance commensurate with the importance of that business, and the peril which might arise from neglect, it is not required to provide against all such unforeseen accidents or misfortunes as could not be averted by the utmost diligence in the management of the road. And as the jury, in passing on the question whether there was or was not willful neglect of duty on the part of the corporation acting through its agents, may have been misled by a misapprehension of the scope and extent of the duties of the corporation, it was erroneous and prejudicial to it for the court, in its instructions, to ascribe to it obligations which the law did not impose.

It is contended for the appellant that as both Filbern and the section boss, to whose delinquency the disaster is imputed, were engaged in the service of the corporation in the same general branch of its business, having in view the safe passage of trains over the road, the maxim *respondet superior* does not apply in behalf of the representative of Filbern in this case, and we are referred to the cases of *Ohio and Mississippi R. R. Co. v. Hamersley*, 28 Ind. 371, *Wright v. New York Central R. R. Co.*, 25 N. Y. 562, *Farwell v. Boston and Worcester R. R. Co.*, 4 Met. 49 [88 Am. Dec. 839], and other adjudged cases in this country and in England as authority.

But so far as these decisions may support the principle asserted in this case, that the fact that the injury complained of was suffered by one employee in consequence of the neglect of another in the same general service exempted the corporation entirely from responsibility for the injury, it will suffice to say that this court, in the case of *Louisville and Nashville R. R. Co. v. Collins*, 2 Duvall, 114, carefully reviewed

the rule now sought to be applied; and while therein exemption is conceded as to the common hazards incident to the acceptance of employment in connection with others, and which the employee is presumed to have undertaken to risk, the rule as applicable to cases of gross or willful neglect on the part of another servant, by whose want of fidelity or criminal fault harm results to his fellow-employee in the discharge of his duty, was rejected as "inconsistent with principle, analogy, and public policy"; and it was held in that case, as in the subsequent case of *Louisville and Nashville R. R. Co. v. Robinson*, 4 Bush, 507, that the implied undertaking of employees in the same service to risk the contingencies which the ordinary skill and care of each, in his line of service, could not avert, did not exonerate the company from liability for damages resulting to one of such co-agents from the extraordinary or gross negligence of another of them. Adhering to the law as thus expounded by this court, we are of the opinion that the court did not err in rejecting the rule contended for, as recognized in some of the English and American cases to which we have been referred.

It is further insisted that the court should have instructed the jury that if there was a neglect of duty on the part of Filbern as well as the section boss, in failing to cause the removal of the tree, the plaintiff could not recover. This was not the law if the section boss or some other agent of the company than Filbern was alone guilty of willful negligence, causing the death of the latter, although in his own sphere he may have been guilty of some neglect of duty: *Louisville and Nashville R. R. Co. v. Robinson*, *supra*.

But there is another and we think fatal objection to the action of the court in so instructing the jury as to make the question of willful negligence depend on the knowledge or belief of the road-master or section boss as to whether the tree was decayed and subject to fall or be blown down across the track, and his failure, though so apprised, to remove it. These were facts from which the jury might have inferred willful neglect, but they did not necessarily constitute it. Whether or not willful neglect is the same as gross neglect, or in any case more or less culpable, it must, we think, involve either an "intentional wrong, or such a reckless disregard of security and right as to imply bad faith," and the court should have substantially so informed the jury.

Wherefore, for the reasons indicated, the judgment is re-

versed, and the cause remanded for a new trial and further proceedings not inconsistent with this opinion.

CONTRIBUTORY NEGLIGENCE ON PART OF PERSON INJURED will prevent recovery, unless the injury was the result of some intentional wrong on the part of the defendant: *Carroll v. Minnesota Valley R. R. Co.*, 97 Am. Dec. 221, and note 226.

NEGLECT OF FELLOW-SERVANTS: See *Carroll v. Minnesota Valley R. R. Co.*, 97 Am. Dec. 221, and note 226.

LIABILITY OF RAILROAD COMPANY TO EMPLOYEES FOR INJURIES RECEIVED FROM OBSTRUCTIONS on the road-bed or track: See the note to *Chicago etc. R. R. Co. v. Swett*, 92 Am. Dec. 218.

LEIBER v. LIVERPOOL, LONDON, AND GLOBE INS. CO.

[6 BUSH, 639.]

CONDITION IN INSURANCE POLICY THAT COMPANY WILL NOT BE LIABLE "for any loss or damage to goods contained in the show-window, when the loss or damage is caused by the light in the window, nor shall the company be liable for loss by theft," applies to theft from the show-windows, and not to theft committed in the necessary removal of goods to save them from impending conflagration.

FIRE INSURANCE POLICY COVERS LOSS BY THEFT IN NECESSARY AND PRUDENT REMOVAL OF GOODS to save them from impending destruction from a fire in an adjoining building.

REMOVAL OF GOODS IS PROPER, WHEN ADJOINING TENEMENT IS BEING CONSUMED, though in fact the store, where the goods were, escaped destruction and even injury. The inquiry should be, What was prudent and seemingly required on the part of the insured from the impending peril at the time of the removal?

DEMAND BY AGENT OF INSURANCE COMPANY UPON INSURED TO REMOVE HIS GOODS, made during a fire in an adjoining building, though it may not fix the liability of the insurer for loss by theft during the removal, as it may have been outside of the agency, is, nevertheless, a powerful and significant fact to establish the propriety of the removal.

ACTION on insurance policy. The opinion states the case.

J. Q. A. King and L. D. Husbands, for the appellant.

Bigger and Moss, for the appellee.

By Court, WILLIAMS, C. J. Appellant insured his stock of goods, then in a certain brick storehouse in Paducah, Kentucky, August 7, 1866. During the period of insurance, a fire broke out at night in the adjoining brick tenement, when the local agent of the company demanded of appellant that he should open his doors and have his goods removed, else his company would not pay the losses if any occurred. Where-

upon he threw open his door and commenced removing his goods to a safer place, in the doing of which some were injured and more stolen. These things are all averred in the petition. The insurance company adjusted the losses by injury, but demurred as to the losses by theft, which the court sustained, and which is the sole question involved on this appeal.

The policy contains this covenant: "Provided always, and it is hereby declared and agreed, that this company shall not be liable to make good any loss or damage by fire which shall happen or arise by any foreign invasion, insurrection, riot, or civil commotion, or any military or usurped power, or by any explosion, earthquake, or hurricane." The policy referred to contains conditions, among which are the following, in addition to the above: "That this company will not be liable for any loss or damage to goods contained in the show-window when the loss or damage is caused by the light in the window; nor shall the company be liable for loss by theft." This is the only exception of loss by theft, either in the policy or its conditions, and this evidently applies to theft from the show-windows, and not theft committed in the necessary removal of goods to save them from impending conflagration.

The real question then is, whether theft in the necessary and prudent removal of goods to save them from threatened destruction by fire is within the covenant of the policy to insure against fire.

In *Tilton v. Hamilton Fire Ins. Co.*, 1 Bosw. 371, the superior court of the city of New York held "that the fire created a necessity of immediately removing the goods, in order to save the whole or part of them from being burned. In making such removal, even if all be removed before the fire reaches that part of the building from which they were taken, a loss, in spite of all precautions, may be produced by at least two causes incident to such an act,—one is a partial injury of some goods themselves by their hurried removal, and the confused state in which they may necessarily for a time be thrown; another is from a theft or abstraction of some part of the goods. If these are not natural results, it is believed that common experience shows that both, in large cities, are almost invariably inevitable results."

The court then determined "that when the damage in any particular case is a direct and unavoidable consequence of the occurrence of the peril insured against, the insurers are

liable, though the immediate agent was not such peril. All the consequences flowing from the peril insured against or incident thereto are properly attributable to the peril itself"; citing *Maguire v. New England Marine Ins. Co.*, 1 Story, 157; *Kahn v. Corbett*, 2 Bing. 205; 2 Arnould on Insurance, 799.

In *Newmark v. London and Liverpool Fire and Life Ins. Co.*, 30 Mo. 160 [77 Am. Dec. 608], the supreme court of Missouri held that the liability of an insurance company for losses by theft is not restricted to the precise period when the fire was extinguished. The precise time when a theft occurs is not important, if it be occasioned directly by the fire, and there be no exception of loss by theft in the policy.

So the supreme court of North Carolina, in *Whitchurst v. Fayetteville Mut. Ins. Co.*, 6 Jones, 352, held that losses arising from *bona fide* efforts to extinguish fire, such as wetting and soiling of goods, and losses by theft consequent upon their removal, are fairly within the contract of insurance.

The supreme court of Illinois, in *Cass v. Hartford Fire Ins. Co.*, 18 Ill. 676, held that the circumstances as they existed at the time must determine the necessity for removal; and whatever loss or damage is necessarily sustained by such removal, when the danger of destruction was so direct and immediate that a failure to remove would have been gross negligence on his part, the insured is entitled to recover. The fire, under such circumstances, may be regarded as the proximate cause of any loss sustained.

In *Talmon v. Home and Citizens' Mut. Ins. Co.*, 16 La. Ann. 426, the supreme court of Louisiana held that where the policy required the assured to labor for the protection of the insured goods, and such goods, in an attempt to avoid a fire, are injured or stolen, the insurer is liable for the loss. And such seems to be the doctrine of the queen's bench of Canada in *Thompson v. Montreal Ins. Co.*, 6 U. C. 2 Q. B. 319.

There can scarcely be a doubt but that the law would require of the insured reasonable efforts, made in good faith, to secure goods from impending peril, and for gross negligence the insured might be exonerated from liability; hence under the facts averred in this case, there can scarcely be a doubt that the removal of the goods would have been proper when the adjoining tenement was being consumed, though in fact the house wherein these goods were escaped destruction, and even injury. The rights of the insured cannot be made to depend on the fact of the destruction of the building, but the

inquiry should be, What was prudent and seemingly required on the part of the insured from the impending peril at the time of the removal? And while, perhaps, the liability of the insurer could not be fixed alone on the demand of its agent, as this may have been outside of his agency, yet the demand of the agent for the removal is a powerful and significant fact to establish the propriety of the removal; and if such removal was proper, then the insurer is liable for all the consequences naturally, inevitably, or probably flowing from it.

Loss by theft about large commercial towns and marts is a consequence as immediate and certain and direct as is the damage to the goods by water and defacement, when goods are necessarily removed to prevent destruction by the peril.

Wherefore the judgment is reversed, with directions to overrule defendant's demurrer, and for further proceedings consistent herewith.

VALUE OF GOODS LOST OR STOLEN WHILE BEING REMOVED FROM BURNING BUILDING MAY BE RECOVERED in an action on the policy of insurance: *Independent Mutual Ins. Co. v. Agnew*, 75 Am. Dec. 638, and note 641; *Newmark v. Liverpool etc. Ins. Co.*, 77 Id. 608, and note 611.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

**FIELD & Co. v. NEW ORLEANS DELTA NEWS-
PAPER COMPANY.**

[21 LOUISIANA ANNUAL, 24.]

IN ORDER TO BIND ACCOMMODATION INDORSER of negotiable instrument, he must be given due notice of non-payment according to the rules of the law merchant.

DOCTRINE ON WHICH NECESSITY OF NOTICE of non-payment to an indorser of negotiable paper rests is the presumption of damage or prejudice in his favor, he being entitled to recourse against another.

INDORSER OF NEGOTIABLE INSTRUMENT, who is entitled to recourse against another, is presumed to be injured by delay in notice of non-payment. He is entitled to prompt notice.

THE opinion states the facts.

Handlin, for the appellants.

Leovy, Rozier, and Buchanan and Gilmore, for the appellees.

By Court, **HOWELL, J.** As stated by counsel for plaintiffs and appellants, the only question presented on this appeal is, Are the members of the New Orleans Delta Newspaper Company, who indorsed the notes sued on, liable without notice of dishonor?

The notes are made by **H. J. Leovy**, business manager, to his own order, and indorsed by him individually, and before delivery to plaintiffs, the first holders, by **D. Da Ponte** and **P. E. Bonford**, all three of whom were members of the company.

It is urged by plaintiffs that these parties are mere sureties,

and not entitled to notice, and in support of this position they rely on a doctrine in the case of *Crane v. Trudeau*, 19 La. Ann. 308, in the following words: "In relation to third persons and *bona fide* holders, the obligations of accommodation indorsers are co-extensive with those of indorsers of business paper. It would be different if the transferee of a note indorsed gets it from the maker. In such a case, the indorser would be a surety."

The latter doctrine, not being essential to the decision in that case, may be regarded as *obiter*; but whether a correct law or not, it cannot apply in this case, when the note is duly indorsed by the payee (who is not the holder), and the subsequent indorsers thus making it on its face commercial paper, and the evidence shows that the defendants intended to bind themselves as accommodation indorsers, and it seems to be settled here, at least since the case of *Weaver v. Marvel*, 12 La. Ann. 517, that although they may, in some sense, be sureties, they are entitled to notice. We must view them as accommodation indorsers, whose liability depends on the rules applicable to negotiable instruments in general, and consequently the holder must take the steps necessary to bind any indorser of business paper according to the law merchant. They were parties to the notes, when received by the plaintiffs: See Story on Notes, secs. 134, 268, 288, 292, 295, 867, 479, 480; *Stone v. Vincent*, 6 Mart., N. S., 517; *Jacobs v. Williams*, 12 Rob. (La.) 183; *Evans v. Hatcher*, 10 La. Ann. 98; *Weaver v. Marvel*, 12 Id. 517; *Ball v. Greaud*, 14 Id. 305 [74 Am. Dec. 431]; *Connelly v. Bourg*, 16 Id. 108 [79 Am. Dec. 568].

In the case of *Keeler v. Bartins*, 12 Wend. 118, it is said that "the circumstances that the indorser is an accommodation indorser adds cogency to the considerations in favor of strict notice of the default."

The doctrine on which the necessity of notice rests seems to be the presumption of damage or prejudice in favor of the indorser, who is entitled to a recourse over against another party. In other words, whoever is entitled to a recourse over against another party is presumed in law to be injured by a delay in receiving knowledge of non-payment,—is therefore entitled to prompt notice: Chitty on Bills, 435.

In this case, the indorsers, if notified in due time, may have secured themselves against, or obtained payment from, the maker.

The plaintiffs contend, however, that the New Orleans Delta

Newspaper Company was a mere private partnership, and its members, not being permitted to plead ignorance of their own affairs, must be held to know that the notes were not paid, that the maker knew it, and notice to one was notice to all.

The reply to this is, that plaintiffs have introduced in evidence the charter, which shows that none of the stockholders had any control of or anything to do with the business, except Leovy, the business manager, and that knowledge is not necessarily notice. The notes were made payable at the Canal Bank, and although Leovy, as business manager, may have known that they were not paid, he did not, therefore, know, without legal notice from the holder or other proper party, that he would be looked to for payment as indorser: See 1 Parsons on Notes and Bills, 521, 525, 526, and 629.

The judgment was correctly rendered in favor of the indorsers.

It is therefore ordered that the judgment appealed from be affirmed, with costs.

Rehearing refused.

NOTICE OF NON-PAYMENT, necessity of giving to accommodation indorser
Fulton v. Macracken, 81 Am. Dec. 620.

NECESSITY OF NOTICE OF NON-PAYMENT: *Union Bank v. Lea*, 41 Am. Dec. 275, and note 277.

CHANDLER v. BARRETT.

[21 LOUISIANA ANNUAL, 58.]

VALID WILL MAY BE EXECUTED by any one having the soundness and strength of mind necessary to make a contract.

WHERE WILL CONTAINS SERIES OF WISE and judicious dispositions, it is for those who attack it to prove unsoundness of mind in the testator at its execution.

WHERE WILL CONTAINS DISPOSITIONS, such as would cause insanity to be presumed, although susceptible of being justified by peculiar circumstances, it is for the legatee to prove the sanity of the testator as against the terms of the will.

IF FACTS OCCURRING NEAR TIME OF DATE of will, and preceding and following it, prove an habitual state of insanity, then, notwithstanding the wisdom of the act, the supporters of the will must prove soundness of mind in the testator during the intermediate time.

IF ACTS OF INSANITY ON PART OF TESTATOR were rare, and occurred at periods distant from each other, and from the date of the will, it will sustain itself, and be presumed to have been made in a lucid interval, at least if the will is not destitute of good sense, and betrays no insanity.

INSANITY IN TESTATOR IS NEVER PRESUMED. Neither old age, forgetfulness of family, largeness of the legacy, nor low rank of the legatee, will of themselves show insanity in the testator.

EXPERTS MAY GIVE OPINIONS, AND THOSE OF PHYSICIANS are received upon questions of professional skill, but they must state the facts upon which the opinions are based, and they must be weighed as other evidence, and are not conclusive.

THE opinion states the facts.

Boyd and Dunn, for the plaintiffs and appellees.

Steele, for the defendant.

By Court, HOWE, J. The plaintiffs in this case allege that they, together with a minor brother and minor sisters, are the sole heirs of Mrs. Christina Chandler, their father's sister, who died in New Orleans on the 2d of August, 1866; that on the twenty-fourth day of July, 1866, the deceased executed an instrument, called and known as her last will and testament, before A. Hero, Jr., notary, by which she bequeathed all her property to the defendant, Barrett, constituting him universal legatee and sole executor; that the will has been admitted to probate upon application of the defendant, but that it is null and void for the reasons that at the time of making the will, and for many years prior thereto, the testatrix was totally disqualified and incapable of making a will, and also for other reasons which, having been abandoned by plaintiffs, it is unnecessary to discuss. They pray that the will may be annulled and avoided, and that the plaintiffs, with their minor brother and sisters, may be adjudged to be entitled to inherit and possess the estate, and for general relief.

The defendant pleads the general denial; especially denies the relationship of plaintiffs' father; avers that the testatrix, "Christina Chandler, at the age of seventy years, lived alone, uncared for and neglected by the plaintiffs, who lived very near to her"; and asserts that the deceased, "when she made her will, and until her death, exhibited more than ordinary proof of sanity and capacity to do business."

There was judgment for plaintiffs, and the defendant has appealed.

The only question in the case, in the view we have taken of it, is, whether Christina Chandler, on the twenty-fourth day of July, 1866, had testamentary capacity, or whether, on the contrary, she was intestable by reason of unsound mind. The question, we must say, is not very clearly presented by the

pleadings, but it seems from the whole record to have been the main point at issue. And here we may remark that, while it is true, as stated by this court in *Aubert v. Aubert*, 6 La. Ann. 106, and urged by plaintiffs at bar, that testaments are more easily avoided than contracts on the ground of unsoundness of mind, yet this distinction applies to such matters as those of notoriety and interdiction, and not to the amount of intellect required in a testator. So far as the latter is concerned, a will may well be made by any mind which has the soundness and strength necessary to endure the conflict involved in the making of a bargain. It would be unreasonable to require that a testator should have more mental vigor and a more lucid memory than a person who makes a contract: See *Merlin*, Répertoire, vol. 13, p. 550; *Stevens v. Van Cleve*, 4 Wash. C. C. 267; *Converse v. Converse*, 21 Vt. 168 [53 Am. Dec. 58.]

It appears from the evidence that Christina Chandler resided in Missouri in 1825; that her husband died in that year; that soon after his death she became the mother of a son, Thomas W. Chandler; that in 1835 she removed to Vicksburg, where she remained until about 1850; that she then came to New Orleans, and lived here with her son up to the time of his death, in April, 1865; and that she survived him about sixteen months, managing his succession, of which she was sole heir, and living alone in the same house in Canal Street, where she had lived for some time before. In considering the question of her alleged unsoundness of mind at the time her will was made, there are some elementary principles which may guide us to a just conclusion. "The Roman law," says Com. Delisle (*Donations et Testaments*, p. 82), "furnished rules on this point which still deserve to be followed. If the testament present but a series of wise and judicious dispositions, it is for the heirs who attack it to prove unsoundness of mind at the date of the testament. If it contain dispositions, such as would cause insanity to be presumed, although susceptible of being justified by peculiar circumstances, it is for the legatee to prove by witnesses the sanity of the testator as against the terms of the testament. But if by facts occurring near the time of the date of the testament, and preceding and following it, the heirs have proved an habitual state of insanity, we are constrained to think that then, and notwithstanding the wisdom of the act, the legatee should be held to prove the existence of soundness of mind during the intermediate time. If, however, the acts of insanity were rare, and occurred at

periods distant from each other, and from the date of the testament, the testament would sustain itself, and would be presumed to have been made in a lucid interval, at least if the act was not destitute of good sense, and betrayed no insanity."

"The presumption," says Toullier, "is always in favor of the act. Insanity is never presumed. The advanced age of the donor, the forgetfulness of his family, the largeness of the legacy, the low rank of the legatee, will not of themselves suffice to decide that the testator is not of sound mind": *Droit Civil*, vol. 3, p. 44. See also *Marcade*, vol. 3, p. 408; *Duranton*, vol. 3, p. 167.

"The presumption of sanity does not cease," says Troplong, "because the testator has experienced some transitory intellectual derangement at a time anterior to the testament": *Donations et Testaments*, vol. 2, p. 56. And the same writer animadverts with characteristic energy upon the tendency he has observed "to transform a morbid susceptibility, an ephemeral, excessive excitement, a superficial trouble, into one of those profound alterations which destroy the reason."

The English law seems to be the same upon these points. In the case of *Chambers v. Queen's Proctor*, 2 Curt. 415, cited by Ray, 272, and 1 Jarman on Wills, 72, the deceased was an attorney, who made his will on the 15th of November, 1839, and committed suicide the next day. He labored under singular delusions, having no foundation in truth, on the three days next preceding the day on which the will was executed; among others, that the benches of the Inns Temple were about to disbar him on account of an imaginary trivial fraud he had practiced on them, and that in consequence thereof he was a lost man, and must be got out of the country. It appeared that delusions equally gross possessed his mind in 1838. But the court (Sir Herbert Jenner) said that the first point to be considered was, whether habitual insanity had been proved, "because it is admitted that where habitual insanity does not exist, the proof of actual insanity at the time the will was made must come from those who impeach the act. The court, therefore, must look for proof of habitual insanity or insane delusion from those who oppose this will." There being no evidence of actual insanity at the moment the will was made, the court was of opinion that no habitual insanity had been proved, and the will was therefore sustained: See also *Fulleck v. Allinson*, 3 Haggl. Ecc. 527.

In the common-law states of our own country, the same

general rules have been laid down: *Clark v. Fisher*, 1 Paige, 174 [19 Am. Dec. 402]; *Jackson v. Van Deusen*, 5 Johns. 144 [4 Am. Dec. 330]; *Halley v. Webster*, 21 Me. 461.

Turning to the evidence in the record, we find the principal acts of folly relied upon by plaintiffs to be,—that about the year 1850 or 1851, the testatrix, Christina Chandler, ran up on the roof of a house, as if trying to escape from an imaginary robber; that about 1856 she had a delusion that her brother had killed seven men and cut them up and thrown them in a well; that “some time before the war” she took all her bed-clothing and her clothes and burned them; that about 1863 she informed one of the witnesses that her son and a young lady had bought a large kettle, and she believed it was their purpose to boil her up in it; that during the last illness of her son, about sixteen months before her own death, she was very miserly in her housekeeping, to his discomfort; that about two weeks before her death she offered to will her property to a neighbor, Mrs. Hannegan, if the latter would attend to her wants in the way of nursing, and afterwards offered to will it to Mr. Hefferon, another neighbor, if he would go in and take care of her during her last illness; that on another occasion, the date of which is not fixed, she had a fear of being poisoned by her son, and refused for a time to drink water from his cistern; that her habits were those of a miser, and that she was afraid of being cheated and robbed; that some time prior to September, 1861, calling at the house of the plaintiffs’ father, Maryland K. Chandler, she would say when she came to the gate: “Maryland, will you kill me?” and he would jokingly reply, “Yes,” and she would then call the witness her sister-in-law.

The plaintiffs also rely on the opinions of experts, but the experts do not seem to agree as to what was the character of Mrs. Chandler’s mental aberration. They do not appear to have considered her imbecile nor afflicted with dementia. In their opinion, the unsoundness took the form of mania of some kind. The judge of the court, who recused himself, and was called as a witness, thought her of unsound mind,—that she seemed to distrust everybody except the judge of the second district court, to have a morbid fear of being robbed and cheated, and to have “a mania for penurious conduct.” He thought, however, that she knew how to keep her money, that she was not violent, and he did not deem it his duty to interdict her. He did not see her after 1865. The first med-

ical witness thought her insane, and seemed to lay much stress upon the delusion, in 1863, in regard to her son, and her manner at that time, and her conduct when her son was ill in April, 1865. He did not see her for about six months prior to her death, except as he saw her passing in the street. The second medical witness declared that she "was afflicted with what is called moral insanity, which is characterized by cruelty to one's kindred." He did not see her after April, 1865.

We may here observe that while it is true that experts may give opinions, and that the opinions of medical men are freely received upon questions of professional skill, it is equally true that they ought also to state the facts on which those opinions are based, and that the opinions themselves are not conclusive, but must be weighed as other evidence: *Brabo v. Martin*, 5 La., O. S., 276; *State v. Bailey*, 4 La. Ann. 377; 1 Jarman on Wills, 78.

We have given a careful consideration to the testimony of these experts, and are constrained to think that no habitual state of insanity has been established by it. Nor do we think the other witnesses have established such a state. Penuriousness or miserly conduct is hardly evidence of such a condition. The desire of the deceased to leave her property to her neighbors, provided they would nurse her in her last hours, seems to have been an effort to attract a kindly attention, and we might adopt in this regard the language of Chancellor Kent, and say: "It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property is one of the most efficient means which he has in protracted life to command the attentions due to his infirmities": *Van Alst v. Hunter*, 5 Johns. Ch. 148.

The fear which Mrs. Chandler had of being robbed and cheated, we do not think unnatural in an aged woman, who appears, for upwards of a year before her death, to have lived alone, unvisited by a single one of her relatives. The plaintiffs and their mother do not seem to have seen her since 1861, although for the greater portion of the time from 1861 to 1866 they resided within three miles of her house. From the squalid style in which she lived, it is as likely that the burning of bed-clothing and clothes "some time before the war," that is at least six years before the will was made, was a sanitary precaution, as that it was the act of a lunatic, and

even if it was an act of pyromania, it was never repeated in any form.

As for the delusions which perplexed her mind at different times during a period of sixteen years, it is to be observed that they were few in number, were not permanent in their character, and were separated from each other and from the date of the testament by long periods of time. They were undoubtedly morbid, and we may presume they indicated cerebral irritation at the time they appeared, but we find no trace of them in the evidence, after the year 1863, and the will was made in 1866.

We are of opinion, therefore, that the plaintiffs have not overcome the presumption of sanity which must exist in favor of a will so rational as that of the testatrix in this case; and we are confirmed in this opinion by the testimony for the defense. We there find Mrs. Chandler, four weeks before her death, consulting a lawyer in regard to a suit which had been brought against her, and stating the facts to him with clearness and accuracy. Two days after she calls again upon her counsel, informs him correctly of her family relations, of the fact that she has no descendants, and states her desire to make a will, so as to dispose of her property as she pleased. She mentions the fact that she knows Mr. Hero, and is advised to employ him as notary. On the day the will was made, Mr. Hero, with these witnesses, went to her house. She told him she desired him to make her last will and testament; she dictated to him the ideas, as written down in the will; she told him that no one had taken care of her (meaning, doubtless, no one whose natural duty it was to care for her); that Mr. Barrett had, and would continue to do so. She then informed the notary that she had some money in the house, gold coin, which she did not wish to keep there, as she had some time before been robbed of her paper money. She then went, with assistance, into the next room, and brought a basket containing six or seven rolls of paper, in each of which she said there were one hundred dollars, except one which contained sixty dollars. The money was counted by the notary, and, as he says, proved to be in amount what she had stated. The money was then handed to Mr. Barrett for safe-keeping, apparently, as she did not wish to keep it "there." She then told the notary that Mr. Barrett had constructed a tomb for her in one of the cemeteries (a fact elsewhere appearing in the evidence), and that, as part of the consideration of

his services, she desired to transfer to him certain vaults she owned, and the written transfer was thereupon made. The plaintiffs urge that this was an act of insane folly, inasmuch as she had given him already over six hundred dollars, gold, and had bequeathed him all her property; but we cannot so regard it. She had given him the gold for safe-keeping, and as for the rest of her property,—it was uncertain when she would die,—the defendant might not have come into possession for years, she might have used it up, as well as the gold, before her death, or she might have revoked her will. We think the act quite business-like. The notary and the witnesses were in her presence about two hours. She seemed a very avaricious woman, who deprived herself of all the luxuries and many of what are generally considered the necessities of life, but to all of these four witnesses she seemed to be perfectly rational, and to have an excellent memory. Her capacity for business, her determined frugality, her knowledge of her property and of her legal rights, her prudent administration of her son's estate for fifteen months prior to the date of the testament, appear elsewhere in the evidence both for plaintiffs and defendant. That she was very penurious and very eccentric is plain enough, but that she was habitually insane is something we cannot affirm.

She had in former years, without doubt, on occasions separated by long intervals of time, suffered from irritation of the brain; but from the evidence, we must deem it to have been of the transitory kind, which, occurring long anterior to the time of the testament, does not cause the presumption of sanity as to that act to cease. If the plaintiffs had shown that, before these isolated acts of folly occurred, her habits of mind were different, and that these acts indicated a permanent and morbid change; if they had shown that the delusions which visited her at various times continued to manifest themselves in some form down to the time she made her will, as if the result of a chronic state,—in short if they had brought themselves within the rule that, where the insanity is proved to have been habitual, the burden of proof is shifted on the legatee, the result might have been different. But as the case comes to us, it seems to fall under the rule we have cited, that if the acts of insanity are rare, and occur at periods distant from each other and from the date of the testament, the testament, if not destitute of good sense, and betraying no

fully on its face, will sustain itself to be presumed to have been the offspring of a healthy volition and a lucid memory.

For the reasons given, it is ordered and adjudged that the judgment appealed from be reversed and avoided, and that there be judgment in favor of defendant, with costs in both courts.

Rehearing refused.

WILL MAY BE VALID THOUGH TESTATOR is incapable of making a valid contract: *Potts v. House*, 50 Am. Dec. 329; *Converse v. Converse*, 52 Id. 58; *Terry v. Buffington*, 56 Id. 423; see *Davis v. Calvert*, 25 Id. 282.

IF TESTATOR WAS HABITUALLY INSANE, the legatee must prove that the will was made during a lucid interval: *Lee v. Lee*, 17 Am. Dec. 722; *Case of Cochran's Will*, 15 Id. 116, and note citing the principal case.

WILL EXECUTED IN LUCID INTERVAL by one who was before and afterwards insane is valid: *Wright v. Lewis*, 55 Am. Dec. 714.

INSANITY OF TESTATOR IS NEVER PRESUMED; it must be proved: *Lee v. Lee*, 17 Am. Dec. 722, and note; *Grabill v. Barr*, 47 Id. 418, and note; *Trumbull v. Gibbons*, 51 Id. 253; *Higgins v. Carlton*, 92 Id. 666, and note 680; but see *contra*, *Gerrish v. Nason*, 39 Id. 589.

GREAT AGE, BODILY INFERMITY, AND IMPAIRED MIND do not vitiate will: *Taylor v. Kelley*, 68 Am. Dec. 150, and note; *Higgins v. Carlton*, 92 Id. 666.

TESTIMONY OF PHYSICIANS AS TO TESTATOR'S INSANITY: *Potts v. House*, 50 Am. Dec. 329, and note 360; note to *Hammond v. Woodman*, 66 Id. 234.

OPINIONS OF EXPERTS MUST BE FOUNDED ON FACTS: *Champer v. Commonwealth*, 74 Am. Dec. 388; *Donnell v. Jones*, 48 Id. 59, and note 73.

SMITH v. STEWART.

[21 LOUISIANA ANNUAL, 67.]

BELLIGERENTS AND BELLIGERENT RIGHTS are properly applicable only to sovereign powers engaged in war. In all other cases they apply *ad modo*, and in a limited and qualified sense. In case of rebellion, where one party strives to obtain independence, and the other to reduce the insurgents to obedience, no such recognition occurs. Yet in the latter case a concession to the extent of humane treatment and exchange of prisoners is recognized as a belligerent right in favor of the insurgents.

BLOCKADE OF SOUTHERN PORTS and exchange of prisoners during civil war, by the United States government, though the exercise of a belligerent right, cannot be construed into a recognition by the federal government of the Confederate States as a belligerent power or *de facto* government.

FACT THAT CONFEDERATE STATES WERE BELLIGERENT POWER did not constitute them a government *de facto*, nor did they attain that status because they established a government of their own and exercised jurisdiction over the country which they embraced.

GOVERNMENT DE FACTO ARISES ONLY where the established government has been subverted by successful rebellion, and the new government exer-

cises undisputed sway for the time over the whole country, or where the people of any portion of a country subject to the same government throw off their allegiance to that government and establish one of their own, and show, not only that they have established it, but their ability to maintain it.

RECOGNITION OF GOVERNMENT OF REVOLTED STATE or province by a neutral power is *casus belli* for the power claiming dominion over the revolted country, if such recognition precedes the exhibition by the newly formed government of its ability to maintain its independence.

GOVERNMENT OF CONFEDERATE STATES did not attain *status* of a government *de facto*. The authority set up by them was illegal and void.

MILITIA OFFICERS ACTING UNDER PROCLAMATION OF GOVERNOR directing the burning of all cotton in danger of falling into the hands of federal officers, unless it could be removed out of their reach, is liable for such cotton as he burned not in immediate and imminent danger of such capture, thus depriving the owner of the privilege of removal, if he were able to do so.

PRESCRIPTION RUNS AGAINST ALL PERSONS, unless they are included in some exceptions established by law. War is not among such exceptions: Ludeling, J., on rehearing.

INABILITY TO SUE WILL NOT PREVENT the running of prescription: Ludeling, J., on rehearing.

MAXIM, "CONTRA NON VALENTEM AGERE NON CURRIT PRESCRIPTIO," does not prevail in Louisiana, except in the cases named in the code: Ludeling, J., on rehearing.

THE opinion states the case.

Philips, for the defendant and appellant.

Race, Foster, and Merrick, and Provosty, for the plaintiff and appellee.

By Court, **TALIAFERRO, J.** The plaintiff in this action alleges that the defendant, Charles D. Stewart, and eight others, in April, 1862, destroyed by fire 275 bales of cotton, the property of plaintiff, which he avers were worth \$85,000. He prays judgment *in solido* against the defendants for that sum, with interest and costs.

The defendants filed separate answers. In the court below, the case was continued as to all the defendants except Stewart, between whom and the plaintiff the present controversy lies. Judgment was rendered in favor of the plaintiff for twelve thousand dollars, and the defendant appealed.

The defendant's answer denies that the cotton belonging to plaintiff was burned at the time specified; and avers that if it were, it was burned by the militia of Pointe Coupee Parish, acting under orders from the regularly constituted authorities of the state, and specifies, as constituting those authorities, the governor, in his capacity of commander-in-chief of the

army and navy of the state and of the militia thereof, and others, subordinate officers of the militia of the state; as well as by the authority of and under the orders of the officers of the Confederate States government, whose orders and authority were at that time obligatory and binding upon the defendant, and which he was compelled to obey. He avers that at that time the militia of the parish were acting under orders from the commander-in-chief; that he was compelled to be a member of the regiment of Pointe Coupee militia, and that as such, nothing was done by him except what he did by the orders of officers whose commands he could not disobey. He pleads the prescription of one year, in bar of the plaintiff's action.

The issues made in this case are, — 1. Is the action prescribed? 2. Was the authority under which the defendant acted a lawful authority? 3. Did he act under compulsion?

And first, as to the question of prescription: The learned and able opinion delivered in this case by the judge *a quo* enables us without difficulty to arrive at a satisfactory conclusion under this head. It is shown that from the time of the capture of New Orleans by the national forces, in April, 1862, a continuous state of alarm and agitation prevailed in the parish of Pointe Coupee, and the adjacent country, during the remainder of the war. Especially from the beginning of the year 1863 to the spring of 1865, the parish of Pointe Coupee was scourged by alternate raids of the military forces of both the hostile parties. Battles and skirmishes were frequent; while that state of affairs continued, the people were panic-stricken from the danger with which they were surrounded. Perturbation and terror were in the ascendant. In that district of country at that time, the Ciceronian maxim, *Silent leges inter arma*, was fully illustrated. It is shown that, during the year 1862, after the plaintiff's cause of action arose, there was only one term of court held in the parish, and that that was a mere formal opening of the court, without the purpose of transacting business; that there was no court held during the years 1863 and 1864; and that the first court held afterwards was at the December term, 1865, under the constitution of 1864, there having been but the one court, and that a mere nominal one, from the 29th of April, 1862, to the first Monday of December, 1865.

It is shown that the defendant, shortly after the burning of the plaintiff's cotton, removed to Texas, where he remained

three years. The petition in this case was filed on the third day of January, 1866, and the citation served on the 14th of March of the same year. But were the officers and the judge of that court, whose sittings were of such rare occurrence, officials deriving their commissions and authority from a legal source? It is contended that the contrary has not been proved, and admitting the court to have been incompetent, still the plaintiff, by diligence, might have filed his suit, and had citation served, and thus been enabled to save his claim from prescription. By the expression "of competent jurisdiction or not," in article 3484 of the Civil Code, relied upon by the defendant, we understand courts of constitutional and legal origin, although incompetent as to jurisdiction of the subject-matter. It is shown that the state, in its then abnormal condition, passed an edict by which suitors who had not sworn allegiance so the confederate authorities were prohibited from instituting suits in the courts; and from this the political *status* of the officers of these courts may readily be inferred. In view of the confusion and dismay of the time, and the general distraction of the country, it is not reasonable to expect diligence to be used in the prosecution of legal rights. In the *furor* and excitement of that period, the closing of the courts, of more than doubtful legality, if open, and the general neglect of all business, except that of war, it would have been a vain and useless thing for the plaintiff to institute an action; and had it been practicable, it doubtless would have brought odium, if not danger, upon him to have instituted the present action.

We think the evidence fully warrants us to determine that in this case there was a suspension of prescription under the equitable principle invoked by the plaintiff, *Contra non valentem agere non currit prescriptio*.

It is in consonance with the spirit of our laws and the jurisprudence of the state to recognize the rule where facts obviously show the equity of its admission: 11 La. Ann. 730, and cases there cited.

2. Was the authority under which the defendant acted a lawful authority?

This inquiry, seemingly, though we apprehend not necessarily, involves the consideration of the much-mooted question, Did the late Confederate States constitute a government *de facto*?

We regard this question rather as a political than a legal one. It does not in our view come properly within the range

of judicial action. Courts should be governed in questions of this character by the authoritative declarations of the national government. Authorities are not wanting to sustain this opinion. But it is urged upon us that the action of the general government during the war towards the states lately in rebellion was such as to recognize them as a belligerent power, and as having a government *de facto*; and that they have been so acknowledged by other powers. This subject has been pressed upon our consideration with much ability and zeal in this case, as well as in others, and we deem it proper to examine it.

In entering unwillingly upon this task, we shall first inquire into the character of this alleged recognition of the late Confederate States as a belligerent power by the United States government. When independent powers, governments *de facto et de jure*, engage in war against each other, they are called belligerents. Certain recognized rules and usages applicable to their condition of hostility, and to their relations to neutral powers, are called belligerent rights. The terms "belligerent" and "belligerent rights" are properly applicable only to sovereign powers engaged in war. In all other cases, they apply *sub modo*, and in a limited and qualified sense. In the case of sovereign powers engaged in war, they recognize each other as sovereigns. In the case of rebellions, where one party strives to obtain its independence, and the other to reduce the insurgent to obedience, no such recognition occurs. Yet in the latter case, modern warfare admits, in the interest of humanity, the humane treatment and exchange of prisoners,—a concession, to that extent, of a belligerent right in favor of the insurgent power. In blockading the southern ports during the late war, the United States government chose to exercise a belligerent right, when as a sovereign it might have accomplished the same object by interdicting commerce through those ports by municipal regulations. This act of blockading the southern ports, and the exchange of prisoners, are construed into a recognition by the United States of the alleged *status* of the Confederate States as a belligerent power. But constructive belligerency and constructive governments *de facto* are novel elements of international law, and not yet incorporated, we imagine, in the law of nations, even in "its newest state." What is the evidence that the late insurgent states were ever recognized as constituting a *de facto* government, either by the United States or any other power? It is not shown, nor, we imagine, can it be, that any formal dec-

laration of such recognition has ever been made by any government by the issuing of any proclamation or state paper importing a national act. No ambassador, minister, plenipotentiary, *charge d'affaires*, or other functionary of that order, was ever sent to Richmond to treat with the government of the Confederate States. No official of that character, sent by the government of the Confederate States to foreign powers, was ever recognized and received in that capacity. If Lord John Russell, in speeches before political meetings, spoke hopefully of the confederate cause, and if now and then a member of Parliament said in his place that the Confederate States were a government *de facto*, and ought to be recognized, it was matter of but little import. Whatever else may have been said or done in England or in France touching these matters, it is certain that no solemn act of either government was ever announced declaring the confederate government a government *de facto*.

Conceding, however, that the Confederate States were a delinquent power, did that constitute them a government *de facto*? Certainly not. It is contended, nevertheless, that its *status* was that of a *de facto* government, because the insurgent states established a government, and exercised jurisdiction over the country which they embraced. In examining this proposition, we must look dispassionately at the stern array of facts that come within the field of view.

What, then, is a government *de facto*?

A government *de facto* arises only where the established government has been subverted by successful rebellion, and the new government exercises undisputed sway for the time being over the entire country, or where the people of any portion of a country subject to the same government throw off their allegiance to that government and establish one of their own, and show not only that they have established a government, but also their ability to maintain it. This principle is founded upon reason and the fitness of things, and is therefore a rule of international law. The recognition of the government of a revolted state or province by a neutral power is *casus belli*, for the sovereign claiming dominion over the revolted country, if such recognition precedes the exhibition by the newly formed government of its ability to maintain its independence. Where recognitions of revolted states have occurred without this manifestation of the ability to sustain

their new condition, they have been simply interventions with the intention of war.

During the cruel and fanatical war waged against the Netherlands by Philip II. of Spain, England recognized their independence for the purpose of becoming a party to the war; fearing that if the Netherlands were subdued, both the government and church of England would be in danger from the power and fanaticism of Philip. What has been the uniform usage of nations on the subject of recognition? Numerous examples might be given. A few will suffice. When, in 1778, France entered into treaties of alliance and commerce with the British North American colonies, then in a state of revolution, she adopted these measures upon the express declaration that "the people of these colonies were in the public possession of their independence, and above all, that their former sovereign had shown by long and painful effort the impossibility of reducing them to obedience."

The uniform course of the United States towards the various provinces of Spain on the American continent which from time to time within the last half-century have been in a state of revolt, has been scrupulously to abstain from the recognition of any of them as *de facto* governments until Spain herself had abandoned the contest, or it became morally certain that her power could never be reinstated.

Now, at what time did the insurrectionary states, in the late unhappy conflict, exhibit to the world their ability to maintain their so-called government against the gigantic power of the United States? If they never did this, the claim set up for them as a *de facto* government must fail. Aside from the fact of their inability to maintain the government they set up being proved by the actual failure, it may justly be said that the result of the conflict was apparent from the beginning. What are the facts? The southern states revolted and established a government founded as they declared upon the great principle of slavery, and with the avowed purpose of perpetuating it. They did this in defiance of the moral sentiment of all christendom. They had, no doubt, the good wishes of the few who yet remain hostile to the march of liberal sentiment, and who cling to the idea of the divine right of kings. But on which side in the fearful strife were the sympathies of the masses of mankind? True, the Confederate States had a constitution, a congress, a president, officers of state; but to what purpose were these things without the power to uphold them?

One half the population of the revolted states was ready at any moment when the opportunity occurred to rise in opposition to the new government, as all sane men knew it would do. No inconsiderable number of the other half helped also to swell the armies of the federal government. Spread over an immense extent of country, and occupying at first all the strongholds within the arena of war, the weaker party were enabled to maintain the unequal contest for several years; but was it the less certain how it must terminate? Cut off from all intercourse with foreign countries by a powerful navy, the exhaustion of the country was slow indeed, but gradual and certain. A merciless conscription, which dragged into the confederate ranks all the efficient men of the country, was wholly inadequate to supply armies to repel the outnumbering forces that were advancing in every direction. The desertion of the laborers left the fields uncultivated. Without money, without manufactures, and without producers, food, clothing, and the munitions of war began to fail. No intervention by any of the powers of Europe was to be expected. The public sentiment of England, in unison with that of the sovereign, restrained the ministry; while the judgment and caution of Napoleon kept him from venturing alone upon a measure by no means free from hazard, in view of his tenure of the throne of France, and of the well-defined position of Russia touching intervention by any of the European powers.

In juxtaposition with this state of things, it was seen that, upon the white basis, the population of the loyal states was more than fourfold that of the Confederate States. From that population the federal forces were not only continually recruited, but continually increased. Abounding in manufactures of every kind, with producing capacities unexampled in the history of any people, with money and credit commensurate with the exigencies of the crisis, the armies of the federal government were better clothed, better fed, better armed, and better paid, than the same vast number of men going forth to war have ever been, in ancient or modern days. With these facts glaringly before the eyes of the world, can it be said that the Confederate States at any time exhibited their ability to maintain the government they established?

The advocates of the proposition that the Confederate States were a *de facto* government resort to English history for authorities to support their position. We think they are not fortunate in doing so. During the long-continued wars car-

ried on by the rival houses of York and Lancaster, when the kingdom was in turn held by the one or the other of the parties, *de facto* governments were alternately established, because intervals of long duration occurred between these alternate occupations of the crown, and during which all strife had ceased. Such was the case during the usurpation of Cromwell. He was in the undisputed possession of the government for a long period, during which he had no opposition. For this reason the Cromwell government was a *de facto* government; and we do not see that it proves anything that Sir Matthew Hale, an undoubted loyalist, held office under it, and that he afterwards held office under Charles II. The words of Lord Hale, quoted with such confidence, are very significant on this point. He says: "The right heir of the crown during such time as the usurper is in plenary possession of it, and no possession thereof in the heir, is not a king within the act on the subject of treason." The authority of Sir Michael Foster is also to the same effect. He says: "A king even *de facto* in the full and sole possession of the crown, he is a king within the statute of treason." It is clear that all these examples drawn from English history, and the authorities cited, make good the premises we have laid down. They all show conclusively the conditions to be absolute and plenary possession without interruption, and no possession of the realm in the adverse claimant. It is matter of history that these conditions were not fulfilled in the case of the confederate government. From a very early period of the contest the federal occupation of territory within the limits of the Confederate States was gradually extended, until the whole country was occupied, or at least until the confederate authority was entirely subverted. We conclude, finally, that by the principles of international law, and the general usage of nations, the late government of the Confederate States did not attain the *status* of a government *de facto*. The authority then set up under the government of the late insurgent states was illegal and void. It cannot, therefore, avail the plaintiff.

3. The third inquiry is, Did the defendant act under compulsion? The evidence sufficiently discloses that he was a willing and ardent soldier in the war against King Cotton. We think he rendered willing rather than compulsory service. But it is nowhere shown by the record that he was actuated by malice or ill-feeling against the plaintiff. It is true that

he acted in the matter of cotton-burning conjointly with the other defendants under a militia officer; but we are rather inclined to think that the militia was a kind of machinery introduced with a view of giving an apparent legalization to the predetermined acts of those who advocated the ruinous policy of destroying cotton. But it is contended that the skirts of the defendant are not free from the flame and smoke of the burning staple. One witness says that the plaintiff set fire to some of his own cotton. It is shown that he caused cotton bales to be hauled out from under his gin, to have them in readiness for the cotton-burners when they arrived, and that he advocated the burning of cotton. The testimony of the one witness in regard to the plaintiff's burning a part of his own cotton appears to have been disregarded on the trial below; and that portion of the testimony showing that he was in favor of the destruction of cotton to prevent its falling into the hands of the federals also shows that he held it premature to burn cotton at that time. It is clearly established that when the torch was about to be applied to his cotton he protested against the act, and earnestly requested time to remove it out of the way of the enemy, stating that he expected a boat in a short time by which he intended to send his cotton up the river, far in the interior.

There is another feature in these transactions worthy of notice. The proclamation of Governor Moore directed the burning of all cotton within the limits of the state which was in danger of falling into the hands of the federal forces, and provided that where it could be removed out of their reach that it should be done. This clothed the militia officers with a margin of discretion, which (as they acknowledged the legality of the order) it was their duty to exercise with propriety and judgment. It is not shown by the record that there was danger at all of the capture of cotton by the federals; on the contrary, it appears that when their vessels of war went up the river, none of the cotton remaining was taken by them! Neither is it shown that at the time the plaintiff's cotton was burned there was immediate and imminent danger of its capture; so that the plaintiff was deprived forcibly of the benefit of the proclamation, which gave him the privilege of removing his cotton if he were able to do so. The party acting under the illegal authority, by which defendant seeks to shield himself, certainly appears not to have exercised a

sound discretion in their proceedings, carried on as they were under mistaken zeal and remarkable delusion.

This case was tried in the court below before a jury. The verdict was against the defendant. We find nothing in our review of the case that authorizes us to alter it.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be affirmed, with costs.

WHETHER CONFEDERATE STATES CONSTITUTED GOVERNMENT *de facto* during the civil war, see *Chisholm v. Coleman*, 94 Am. Dec. 678; *Hawver v. Seldenridge*, 94 Id. 532, and notes to these cases; *Simpson v. Lovering*, 96 Id. 252. *Contra: Watson v. Stone*, 91 Id. 484; see also *Yost v. Stout*, 94 Id. 194.

WHAT CONSTITUTES GOVERNMENT DE FACTO: *Chisholm v. Coleman*, 94 Am. Dec. 678.

TO WHAT EXTENT UNITED STATES CONCEDED BELLIGERENT RIGHTS to the Confederate States during the civil war: *Hedges v. Price*, 94 Am. Dec. 507, and note 520; *Johnson v. Jones*, 92 Id. 159, and note 182.

RIGHTS OF BELLIGERENTS AS RECOGNIZED by international law between sovereign powers do not apply to war between the states: *Yost v. Stout*, 94 Am. Dec. 194.

DANGER MUST BE IMMEDIATE or impending, or the necessity urgent, to justify seizure of private property in time of war: *Yost v. Stout*, 94 Am. Dec. 194, and note 200.

FLEMING AND BALDWIN v. SHIELDS. JONES, INTERVENOR.

[21 LOUISIANA ANNUAL, 118.]

IN ABSENCE OF FRAUD AND COLLUSION, INTERVENOR IN ATTACHMENT will not be permitted to urge defenses which are personal to defendant. Questions of the admissibility of the testimony and the formality and regularity of the pleadings are matters for the consideration of defendant, and if he sees fit to waive them, he may.

INTERVENOR IN ATTACHMENT can only show that the property attached is his; he cannot contest the plaintiff's claim against defendant, nor urge any irregularities in the suit.

THE opinion states the facts.

Farrar and Reeves, for the appellants and the intervenor.

Shaw, for the appellee.

By Court, WYLY, J. Plaintiffs sued out writs of provisional seizure and attachment against the property of the defendant, who was an absentee, alleging he owed them the amount of an account for advances and supplies furnished his plantation in the parish of Tensas. The products and movables on the place and defendant's half-interest in the plantation were

seized under these writs by the sheriff on the 2d of December, 1867.

The defendant accepted service, and waived legal and technical formalities. He also admitted the correctness of the account sued on, and set up no defense against plaintiffs' demand.

On the 10th of November, 1868, the intervenor filed his petition of intervention in this case, alleging that he held a mortgage bearing on said plantation, or the undivided half thereof owned by the defendant; also alleging that the attachment was null and void because of the illegality of the affidavit, the insufficiency of the bond, and other informalities; and by supplemental and amended petition he charged that the defendant, Joseph D. Shields, was in insolvent circumstances at the date of the levy of plaintiffs' writ of attachment to the knowledge of plaintiffs, who fraudulently colluded with him to have said attachment levied upon said plantation in order to give, if possible, the lien of the attaching creditor a preference and priority over the special mortgage of the intervenor, which, by an oversight, was not recorded in the mortgage office of said parish till a few days subsequent to the levy of said writ.

On the trial there was judgment in favor of plaintiffs for the amount claimed by them, with a privilege on the property attached, from the date the attachment was levied,—to wit, the 2d of December, 1867,—and the intervention was rejected at the costs of the intervenor.

From this judgment the intervenor has appealed.

From a careful examination of the record, we are of opinion that the intervenor has failed to establish his allegation of fraud and collusion between the plaintiffs and the defendant; he has failed to establish that the defendant, Joseph D. Shields, was an insolvent at the time the attachment was levied and at the time of the trial of this cause. Proof that the plantation in controversy was worth less than the amount of plaintiffs' claim and the claim of the intervenor does not establish the allegation that the defendant was notoriously insolvent. He lived in Mississippi, and might have in that state ample means to pay all his debts. We cannot presume that the plaintiffs and defendant are guilty of fraud and collusion in the absence of proof to sustain that charge.

The district judge refused to permit the intervenor to offer proof of the irregularity of the affidavit, the insufficiency of the

attachment bond, and other informalities in the proceedings. He permitted the plaintiffs to offer in evidence their acknowledged account against the defendant, and when the intervenor objected thereto because the necessary revenue stamp was not attached to said acknowledged account, the district judge permitted the attorney of plaintiffs to affix thereto a five-cent United States revenue stamp, and file the same in evidence. To all of which rulings the intervenor took a bill of exceptions.

We think the district judge did not err in his rulings, and the bill of exceptions was not well taken.

In the absence of fraud and collusion, the intervenor will not be permitted to urge defenses which are personal to the defendant. Questions of the admissibility of the testimony and the formality and regularity of the pleadings are matters for the consideration of the defendant; and if he saw fit to waive them, no other party can complain.

In the case of *Lee v. Bradlee*, 8 Mart. 55, where a third party intervened in the attachment suit, claiming the property, this court said: "A third party has stepped in, averring the goods attached to be his property, and demanding restoration of them. The claimant has not only attempted to prove the property to be his, but he has been acting the part of the defendant by undertaking to show that the attachment ought not to have issued, and that after it had issued it was imperfectly executed. The only thing which we conceive a claimant may be permitted to do is to show that the property attached is verily his. As soon as he succeeds in that, his part is at an end. But a claimant has surely no right to show any irregularity in the suit in which he intervenes for the sole purpose of rescuing the property. Whether the plaintiff, the court, and the sheriff, have been acting legally or not, is none of his business."

The only difference between this case and the one just referred to is, in that case the intervenor claimed to be the owner of the property attached, while in this the intervenor claims that he has a mortgage on the property attached. The principle is the same. The same doctrine is affirmed in the case of *West v. His Creditors*, 8 Rob. (La.) 123, in which this court said: "An intervenor who claims property in controversy between other parties cannot contest the plaintiff's claim against the defendant, nor urge any irregularities in the suit."

In the case of *Yeatman v. Estill*, 13 La. Ann. 222, it was held that "it is no longer competent for the intervening party

to object to the mode in which the writ of attachment has been executed." The intervenor admits that plaintiffs' attachment was levied prior to the registry of his mortgage. Without inscription, his mortgage had no effect against third persons: Civ. Code, sec. 3314. As to plaintiffs, the property of the defendant stood free of encumbrance the day their attachment was levied, because the intervenor had not inscribed his mortgage. Plaintiffs acquired attaching creditors' privilege on the plantation reverting from the judgment to the day the attachment was levied: Code Proc., secs. 264, 265; *Beck v. Brady*, 7 La. Ann. 1; *Tufts v. Carradine*, 3 Id. 430.

It is therefore ordered that the judgment appealed from be affirmed, with costs.

INTERVENTION, RIGHT OF IN ATTACHMENT SUITS: *Speyer v. Imela*, 81 Am. Dec. 157.

INTERVENOR STANDS IN CHARACTER OF PLAINTIFF, and is governed in his pleadings by the rules of practice applicable to plaintiffs in principal demands: *Clapp & Co. v. Phelps & Co.*, 92 Am. Dec. 445.

INTERVENORS, RIGHTS OF, GENERALLY: *Brown v. Saul*, 16 Am. Dec. 177-184, citing the principal case at page 180.

INTERVENOR CANNOT URGE IRREGULARITIES in the suit, such as the insufficiency of the bond or affidavit on which attachment issued: *Carroll & Co. v. Bridewell*, 27 La. Ann. 241, citing the principal case.

CHAPMAN v. NEW ORLEANS, JACKSON, AND GREAT NORTHERN RAILROAD COMPANY.

[21 LOUISIANA ANNUAL, 224.]

BURDEN OF PROOF IS ON COMMON CARRIER to excuse non-delivery of freight received for transportation.

JUDGMENT APPEALED FROM WILL BE AVOIDED and annulled if erroneous and the judgment which should have been given will be rendered.

THE opinion contains the facts.

Marr and Foute, for the plaintiff and appellee.

Simonds, for the defendants and appellants.

By Court, HOWE, J. The plaintiff sues to recover the value, at Jackson, Mississippi, of a shipment of sugar and molasses delivered to the defendants, at Hammond Station, on the 25th of April, 1863, to be transported by the latter to Jackson. The shipment of the goods is admitted, and the non-delivery at the place of destination. It also appears that the freight

money was paid by plaintiff to defendants at Tangipahoa, a few miles beyond the point of shipment. The defense is, that "at or near Tangipahoa Station the progress of said merchandise was arrested by 'Grierson's raid,' and the same for security from devastation by federal troops was stopped at said station, and by the impossibility of proceeding farther on the road in consequence of military orders as well as by destruction of the road; that while said merchandise was then and there at Tangipahoa, the same was destroyed by a military force acting under orders of Colonel Dumontiel, of the confederate army, and lost by a *vis major*, by circumstances beyond the power of defendants to prevent, and without any fault on their part."

There was judgment for plaintiff for the sum of \$1,274.33, in gold, or its equivalent in United States treasury notes, with interest thereon from April 25, 1863, and defendants have appealed.

The reception of the property by defendants as carriers for hire imposed on them the burden of excusing its non-delivery, and the question whether the record establishes any legal excuse is mainly one of fact. The goods had apparently arrived as far as Tangipahoa on the 25th of April, 1863. From that place to the point of destination they might have been carried in a few hours, the distance being about one hundred miles. They were there unloaded from the cars, placed on a platform, and, about the 16th of May following, destroyed, as a witness informed us, by "confederate soldiers, citizens, and negroes, who knocked in the heads of the sugar hogsheads and helped themselves, and carried off as much as they could." The witness continues:—

"Colonel Dumontiel left the same day before the destruction with a few soldiers, being chiefly, if not entirely, his staff. The federal cavalry came into Tangipahoa in less than an hour after the destruction of the sugar, and they burned the depot and platform, and what sugar and molasses had not been taken off before they came was burned with the depot."

This cavalry appears to have been, not Grierson's, but a force that came up from New Orleans.

F. Dumontiel testifies that, during April, and up to the 16th of May, 1863, he was in command of the post of Tangipahoa, and saw sugar and molasses lying out at the depot there. He states that the road was cut by Grierson's force between Tangipahoa and Jackson about the latter part of April, and cer-

tainly prior to the 1st of May. He does not fix the date, nor does he confirm the plea that the goods were destroyed by his orders. He states that before the road was cut by Grierson he had orders not to permit private freight to be transported on the Jackson railroad, and notified the railroad officers or employees at Tangipahoa of such military orders, but of these orders and that notification he does not fix the date.

We have been referred by defendants to a "pictorial history of the war" to show that the Jackson railroad was cut by Grierson's force on the 28th of April, 1863. If we admit that the date can be fixed by such method, we fail to discover in this or in the other facts of the case that the defendants have established any sufficient excuse for the non-delivery of plaintiff's property. There is no proof whatever that the property was destroyed by orders of Colonel Dumontiel, and it is not necessary, therefore, to determine what effect such orders would have had in law, if given and obeyed. There is no proof when military orders were given to forbid the transportation of private freight over the Jackson road, and it is unnecessary, therefore, to consider what effect they would have had in law if they had been connected with the date when the goods arrived at Tangipahoa. Admitting that the road was cut by Grierson's raid on the 28th of April, 1863, we find that three days were available to the defendants to convey the property from Tangipahoa to Jackson, a journey of a few hours. The goods arrived at Tangipahoa on the 25th of April, and the freight money was there paid by plaintiff to defendants; and the record does not disclose any reason sufficient in law to justify the unloading at that station of the plaintiff's property, and the exposure of it to the destruction which came some three weeks afterward.

The judgment would be in all respects affirmed, if regular in form, and for the proper amount of interest. As it is admitted by plaintiff's counsel that the rights of his client would be satisfied by a judgment in lawful money for the sum fixed by the court as the value of the property, and as interest is due, not from the time of shipment, but from judicial demand (*Clines v. Frisbee*, 5 Rob. (La.) 192), it is ordered and adjudged that the judgment appealed from be avoided and annulled, and that the plaintiff have judgment against defendants for the sum of \$1,274.33, with five per centum per annum interest from February 1, 1866, with costs of the lower court, and that the plaintiff pay the costs of the appeal.

Rehearing refused.

BURDEN OF PROOF IS ON COMMON CARRIER to excuse loss of goods: *Steele v. Townsend*, 79 Am. Dec. 48, and note 57; *Western etc. Co. v. Newhall*, 76 Id. 760, and note 776.

POWER OF APPELLATE COURT to alter judgment: *Brownell v. Winnie*, 86 Am. Dec. 314.

BLUM & Co. v. MARKS. WRIGHT, BRINKERHOFF, & Co. v. MARKS. SONNEBORN & Co., HERMAN, AUGUSTE, & Co., HERZOG & Co., DRYFOOS & Co., INTERVENORS.

[21 LOUISIANA ANNUAL, 288.]

LOUISIANA COURT WILL RECOGNIZE RIGHT OF STOPPAGE IN TRANSITU arising from a sale of goods in New York to a vendee in New Orleans, who becomes insolvent before the goods are delivered.

CLAIM OF VENDOR TO EXERCISE RIGHT OF STOPPAGE IN TRANSITU is superior to the lien of attaching creditors, when the former shows that he had the right of stoppage, and duly exercised it.

VENDOR MAY EXERCISE RIGHT OF STOPPAGE IN TRANSITU when he proves that at the time of the sale he was not aware of the insolvency of the vendee; and the discovery of such insolvency before delivery entitles him to exercise the right, though the goods are attached by creditors of the vendee.

THE opinion contains the facts.

Phillips and Levy, and Hornor and Benedict, and Tissot, for the intervenors and appellants.

Cooley, for the plaintiffs and appellees.

By Court, HOWE, J. The plaintiffs in these cases, residents of the city of New York, attached on board the steamship *Star of the Union*, upon her arrival at this port on the 24th of April, 1866, certain merchandise which had been sold to the defendant by the intervenors about the twelfth day of the same month, and consigned on the steamer above named.

The obligations on which the plaintiffs sued were contracted February 23, 1866, and were for goods sold at a credit of sixty and ninety days, and upon notes at forty-five and sixty days.

The property seized consisted of six cases of merchandise. They never came into the active or constructive possession of the defendant, to whom they had been shipped. It appears that he had absconded after the purchase of the goods and before their arrival, and the deputy sheriff executed the writs of attachment at the moment the vessel touched her wharf in New Orleans.

The vendors of these goods intervened, claiming respectively such portion as each had sold, on the ground, substantially, that they had sold the property to defendant about the 12th of April; that he had become insolvent, and that they had exercised the right of stoppage *in transitu*, in such manner and at such time as to give them a claim on the property superior to that of the plaintiffs.

Pending the litigation, and at the instance of plaintiffs, the goods were sold by the sheriff. The court *a quo* gave judgment in favor of I. Blum & Co. for the amount of their claim, to be paid by preference out of the proceeds of sale, and dismissed the claims of the plaintiffs, Wright, Brinkerhoff, & Co., and the claims of all the intervenors.

From this judgment the intervenors only have appealed; and the present contest is therefore between I. Blum & Co. as attaching creditors, and the intervenors as vendors, who claim to have stopped the goods in transit.

It seems to be conceded by the parties that the courts of this state will recognize the right of stoppage *in transitu*, arising from a sale in New York, combined with such other facts as by law confer the right. It is quite clear, also, that under the facts of this case, as they will hereafter appear, the privilege of the attaching creditors must yield to the claims of the vendors, provided the latter show that they had the right of stoppage, and duly exercised it: *Buckley v. Furniss*, 15 Wend. 143; *Hepp v. Glover*, 15 La. 464 [35 Am. Dec. 206]; *Marshall v. Fall*, 9 La. Ann. 92.

It is contended by plaintiffs that if the defendant was insolvent at all, he was insolvent at and before the time of the sale of the goods in dispute, and that therefore the right of stoppage did not exist, and this brings us to the main question in the case. It is clear that the defendant was in failing circumstances at the time he made the purchases, but we do not find at that moment any visible change in his pecuniary condition, any open and notorious act on his part, calculated to affect his credit, and put the vendors on their guard. It may well be that if the intervenors knew the defendant to be insolvent at the time of sale they could not claim the right; but it is plain that in this case they were not aware of the condition of the defendant. About seven weeks before they made the sales, he had a standing in New York good enough to enable him to obtain credit from the very plaintiffs in these suits to the extent of some eight thousand dollars. The in-

tervenors, so far as we can discover, were not aware of any change in his pecuniary condition when they sold him the goods in controversy. They show that they shipped the goods by the *Star of the Union*; that in three or four days they learned for the first time that he was an insolvent, and had absconded; that they immediately notified the carrier in New York, requiring him to hold the goods; that as to three of the intervenors, the agent of the line in New York telegraphed to the agent in New Orleans directing him to hold the goods; and that as to the other, notice was given to the agent in New Orleans by the attorneys. These telegrams were received, and this notice given here about four days before the steamer arrived; and the agent in New Orleans testifies that he was thus prepared to hold the goods, and would have done so if the sheriff had not taken them out of his hands. Under such circumstances, it would seem inequitable, indeed, to allow the plaintiffs to seize these goods of which the intervenors had practically resumed possession.

We have been referred by plaintiffs to the case of *Rogers v. Thomas*, 20 Conn. 53, in support of the doctrine for which they contend, that the insolvency of the vendee must occur after the sale to authorize the stoppage; but the case does not fully sustain their view. In that case, the court said, page 63:—

“We think, therefore, that, in order to authorize a stoppage *in transitu*, there should be some ostensible and certain criterion by which the insolvency of the vendee may be ascertained; and that it should consist of some sensible change in his pecuniary situation, some open, notorious act on his part, calculated to affect his credit,—some change in his apparent circumstances which would operate as a surprise on the vendor, and which, if he had known, he would not have given credit to the vendee.

“The remaining inquiry respects the time when such insolvency must occur in order to confer the right. On this point, we are of opinion that it is not sufficient if it exists when the sale takes place, but that it must intervene between the sale and the exercise of such right.”

We apprehend that this language, if entirely correct, would not militate against the claims of the intervenors, for no such insolvency appears in this case until three or four days after the sale.

In *Botlingk v. Inglis*, 3 East, 381, where goods were shipped

from St. Petersburg to London to a person who had committed an act of bankruptcy before the shipment, the right of stoppage was recognized, under the law merchant, as well as the Russian law.

In *Buckley v. Furniss*, 15 Wend. 139, it was considered that if the seller knew of the insolvency at the time of sale the right might not exist; but it seemed to have been taken for granted that if he did not know of it, its covert existence would not impair the right.

In *Conyers v. Ennis*, 2 Mason, 236, the vendee was "deeply and fraudulently insolvent" at the time of the sale; yet Mr. Justice Story, who delivered the opinion of the court, does not seem to have thought that this fact would destroy the right of stoppage; but the right was denied, because, before its exercise, the transit had been terminated by delivery.

In his late work on mercantile law, Mr. Parsons says: "It has been held that the insolvency must occur after the sale has taken place"; and he cites the case of *Rogers v. Thomas*, 20 Conn. 53, in which, as we have seen, the word "insolvency" is used in the sense of a notorious failure of credit; "but," he adds, "we are not disposed to consider this as the correct rule, but should hold that the right existed in case of insolvency before the sale, unless this fact were known to the vendor at the time of the sale": *Parsons on Mercantile Law*, ed. 1862, p. 61, and notes.

In fine, if, as seems to be now well settled, the right of stoppage be only an extension of the common-law lien of the seller on the thing sold for his price, we are unable to perceive any reason for the distinction sought to be established by the plaintiffs in this case, and must therefore conclude that the judgment of the district court was erroneous.

Our attention is called to a bill of exceptions reserved by plaintiffs to the introduction by the intervenors of certain telegraphic dispatches, "purporting to be dispatches from their houses in New York to A. Moulton, agent in New Orleans, requesting the agent to hold, and not deliver, certain cases of merchandise shipped by them to defendant," on the ground that no proof was made that the papers produced were in the handwriting of any person employed in the telegraph-office, or any other proof of their authenticity, and they refer to *Richie v. Bass*, 15 La. Ann. 668.

We find in the record no such dispatches as those referred to in this bill of exceptions. It appears elsewhere that the in-

tervenors gave due notice to the carrier in New York that such notice was communicated to the agent in New Orleans in ample time, and that the goods were never delivered to the consignee. It seems unnecessary therefore to pass upon the bill.

For the reasons given it is ordered and adjudged that the judgment appealed be, as to said I. Blum & Co. and the said intervenors, avoided and reversed; that the claim of said plaintiffs be dismissed as in case of nonsuit; and that each of the intervenors have judgment respectively for the proceeds of the sale of the goods claimed and identified by each, with costs, to be paid as follows: To Sonneborn & Co., the proceeds of the case of goods marked "No. 7407"; to M. Herzog & Co., the proceeds of the case of shirts, etc., marked "A. L. Marks"; to L. Dryfoos & Co., the proceeds of the three cases marked "A. L. M., 1068, 1069, 1070"; and to Herman, Auguste, & Co., the proceeds of the remaining one of the six cases seized and sold. It is further ordered that the appellees, I. Blum & Co., pay the costs of the appeal.

RIGHT OF STOPPAGE IN TRANSITU is superior to an attachment lien: *O'Brien v. Norris*, 77 Am. Dec. 284, and note 288.

TO ENTITLE VENDOR TO RIGHT OF STOPPAGE IN TRANSITU, knowledge of the insolvency of the vendee must come to him after the sale, and before delivery: *O'Brien v. Norris*, 77 Am. Dec. 284, note 288; *Chapman v. Lathrop*, 16 Id. 433.

STOPPAGE IN TRANSITU. — The subject is discussed in the note to *Haus v. Judson*, 29 Am. Dec. 384, 394.

SUCCESSION OF EHRENBERG.

(21 LOUISIANA ANNUAL, 280.)

INSTRUMENT ENTIRELY WRITTEN, DATED, AND SIGNED by the testator is clothed with all the formalities of law required to constitute a valid olographic will.

ONE MAY DISPOSE OF HIS PROPERTY BY WILL in any manner whatever, whether he institutes an heir or only names legatees.

WHEN, FROM TERMS OF WILL, the intention of the testator cannot be ascertained, recourse must be had to all circumstances which may aid in the discovery of his intention.

THE opinion states the facts:

Dalsheimer and Buck, and *Roselius and Phillips*, for the appellant.

Dunn, for the appellee.

By Court, LUPELING, C. J. Upon the decease of Gustave Ehrenberg, application was made to the judge of the second district court of New Orleans to probate the following instrument as the last will and testament of said Ehrenberg, to wit:—

“NEW ORLEANS, September 15, 1859.

“Mrs. Sophie Loper is my heiress. G. EHRENBURG.”

“NEW ORLEANS, March 16, 1861.

“The legatee’s name is correctly spelt Loper.

“G. EHRENBURG.”

On the back of this instrument is written the following:—

“Ehrenberg’s will, to be opened by S. B. Patrick, who will see it executed. A copy of this will is left in the hands of the heiress.”

The judge refused to probate the act, on the ground that it was not a testament,—that there was no disposition of property; that the language could not be regarded as an expression of his will that Mrs. Loper should inherit his property.

From this ruling an appeal has been taken. A testament is an act clothed with certain formalities by which the last will of the testator is manifested in relation to the disposition of his property after his death. It is proved that this instrument is entirely written, dated, and signed by G. Ehrenberg. It is, therefore, clothed with the formalities required by law for an olographic testament.

The code declares that one may dispose of his property by will “in any manner whatever, whether he has instituted an heir or only named legatees”: Civ. Code, art. 1563. And we are directed by the code that, “when, from the terms made use of by the testator, his intention cannot be ascertained, recourse must be had to all circumstances which may aid in the discovery of his intention”: Civ. Code, art. 1708; *Lyon v. Fisk*, 1 La. Ann. 444; *Clark v. Preston*, 2 Id. 580.

If, then, any doubt be entertained in regard to what the deceased intended by the terms “Mrs. Loper is my heiress,” we are authorized to refer to his acts, in connection with this will, to learn the sense in which he used the words. More than a year after Ehrenberg made the will, he wrote on the same sheet of paper, and below the will: “The legatee’s name is correctly spelt Loper,” and on the back of the document is indorsed, in his handwriting: “Ehrenberg’s will, to be opened by S. B. Patrick, who will see it executed. A copy of this will is left in the hands of the heiress.”

It is certain that Ehrenberg intended to make a will, and that he intended that the act in question should be probated and executed as his testament. It seems to us equally certain that the desire—will—of Ehrenberg was, that Sophie Loeper should have his property after his death,—inherit it,—that she should be his heir or universal legatee. The testator's intention is the object to be ascertained, and when learned beyond a reasonable doubt, it is the duty of courts to enforce it, if the dispositions be not reprobated by law: D. 83; L. 10; T. 7, l. 2 sec.; *Succession of Franklin*, 7 La. Ann. 395; *Fuselier v. Masse*, 4 La. 425.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be reversed, and that the act in question be and is hereby declared to be the testament of G. Ehrenberg; and that as such it be executed, after the formalities required by law shall have been complied with; and that, for this purpose, the case be remanded to the district court. It is further ordered that the succession pay the costs of this appeal.

DOCUMENT ENTIRELY WRITTEN, SIGNED, AND DATED by the testator is a valid olographic will: *Pena v. New Orleans*, 71 Am. Dec. 506, and note 509.

INTENTION OF TESTATOR must generally be gleaned from the terms of the will itself: *Stoner's Appeal*, 45 Am. Dec. 608, and note 610; *Baskin's Appeal*, 45 Id. 641; *Asay v. Hoover*, 45 Id. 424; *Eatherly v. Eatherly*, 78 Id. 499, and note 505; *German v. German*, 67 Id. 451.

LIVINGSTON v. GAUSSEN.

[21 LOUISIANA ANNUAL, 286.]

EXECUTOR OR ADMINISTRATOR, BY MAKING OR INDORSING NOTE in his official capacity, cannot thereby bind the estate, but is himself responsible for the amount, and the holder need not allege that the executor or administrator exceeded his powers or functions, in order to maintain an action against him personally.

WHERE EXECUTOR OR ADMINISTRATOR MAKES NOTE in his official capacity, the presumption of law is against him, and the burden of proof on him to allege and prove that he is not individually liable.

HOLDER OF NEGOTIABLE INSTRUMENT, made or indorsed by an executor as such, may sue such party individually thereon, leaving the latter under certain circumstances to set up the defense that he is not personally liable.

THE opinion states the facts.

Conrad and Sons, for the plaintiff and appellant.

Roselius and Philips, for the defendant and appellee.

By Court, HOWELL, J. This suit is brought against the legal representative of J. K. Elgee on a note made by him as "executor of the estate of Kelso," to the order of and indorsed by W. and D. Urquhart.

The defendant pleaded the peremptory exception that no cause of action is set out against Elgee individually, as he signed said note in his fiduciary capacity, and plaintiff could only sue the estate of Kelso.

In support of this exception, which was maintained by the judge *a quo*, defendant's counsel quote the cases of *Gillett v. Rachal*, 9 Rob. (La.) 276, and *Bank of Louisiana v. Dejean*, 12 Id. 16.

In these cases the representatives of the successions were declared not to be personally liable on notes signed by them in their fiduciary capacity, because, in defense, it was shown that they had not bound themselves individually, but had, to the knowledge of the plaintiff, simply given acknowledgments, in the form of notes, of debts existing at the opening of the successions represented by them. In each of the cases the general doctrine was distinctly recognized, "that an executor or other administrator, by making or indorsing a note in that capacity, cannot thereby bind the estate, but will make himself responsible for its amount"; that he "cannot, in any transaction in which he pretends to act as such, create any liability on the estate, or change the nature of its obligations, or increase its responsibility with regard to its outstanding debts, and if he do so, he will be personally bound." This is the well-settled doctrine in our jurisprudence on this subject: See *Flower v. Swift*, 8 Mart., N. S., 451; *Russell v. Cash*, 2 La. 185; *Hestres v. Petrovic*, 1 Rob. (La.) 119; *Burbank v. Payne*, 17 La. Ann. 17. And the question is, Must the holder of a note made by an executor allege that the latter exceeded his powers and functions, in order to maintain an action against him personally?

We think not. The powers of executors and administrators are conferred by law, and among them is not the power to make and indorse notes. When, therefore, they assume or exercise such a power, the presumption of law is against them, and the burden is on them to plead and show in defense that they are not individually liable. In the case of *Russell v. Cash*, 2 La. 185, which was a suit on a draft drawn by the defendant Cash as "executor of Moses Kirkland, deceased," the charge of the district judge to the jury, "that the allegations of the petition would not support an action against the

executor in his individual capacity; he must be charged with having improperly and falsely described himself as executor after his functions had ceased,"—was not sustained; and the court said: "The executor having no authority to bind the estate by drafts, bills of exchange, or notes, the suit against him as representative of the estate cannot be maintained. . . . The defendant is, however, responsible on the draft given in his private capacity. The words, 'executor of Moses Kirkland,' added to his signature, can be considered in no other light but as words of description, which neither add to nor diminish the individual and personal responsibility of the party using them," and judgment was rendered against Cash individually, although he was sued only in his representative capacity.

In *Flower v. Swift*, 8 Mart., N. S., 451, it said: "As the executor cannot bind the estate by indorsement, it follows that the liability resulting from those he makes is personal."

Mr. Parsons, in his work on notes and bills, volume 1, page 161, maintains the same doctrine, and says: "If an administrator or executor make, indorse, or accept negotiable paper, he will be personally liable, even if he adds to his own name the name of his office, signing a note, for example, 'A, as executor of B'; for this will be deemed only a part of his description, or will be rejected as surplusage."

Wherever, therefore, negotiable paper is made or indorsed by a party as executor, the holder is not bound to consider it a mere acknowledgment of a debt of the estate, and required to wait for payment in the ordinary course of administration; but he may institute his action against such party individually, leaving to the latter the right, under certain circumstances, to set up a defense that he is not personally responsible.

It is therefore ordered that the judgment appealed from be reversed, the exception of the defendant overruled, and this cause remanded to be proceeded in according to law. Costs of appeal to be paid by defendant and appellee.

CONTRACTS MADE BY EXECUTOR OR ADMINISTRATOR in his official capacity are personal, and do not bind the estate: *Fitzhugh's Ex'r v. Fitzhugh*, 62 Am. Dec. 653, and note 659; *May v. May*, 68 Id. 431; *McEldery v. McKennie*, 27 Id. 643; *Mason v. Caldwell*, 48 Id. 330.

ADMINISTRATOR IS PERSONALLY LIABLE on a note signed by him as administrator: *Davis v. French*, 37 Am. Dec. 36, and note 33.

NELLIGAN v. CITIZENS' BANK OF LOUISIANA.

[21 LOUISIANA ANNUAL, 332.]

MILITARY ORDER DIRECTING BANK TO MAKE STATEMENT of deposits therein belonging to army officers of the Confederate States, and also directing the bank to pay to the proper officer of the quartermaster's department all money in its possession belonging to, or standing upon the books to the credit of, such officers, is an attempt on the part of the military authorities to sequester such money; but if the money paid over is confederate currency, it is not a sequestration so as to exonerate the bank from liability for a deposit made in lawful money.

PAYMENT BY BANK IN CONFEDERATE MONEY, to officers of United States under military order, of a deposit in lawful money, made in such bank by a confederate officer, does not discharge the bank from liability for payment of the deposit upon demand.

THE opinion states the facts.

Breaux and Fenner, for the plaintiff and appellant.

Pitot, for the defendants and appellees.

By Court, HOWE, J. The plaintiff sues for three thousand five hundred dollars, the amount of a deposit made by him in the bank of defendants on the 4th of January, 1862. The defense set up in the answer is, that the amount of the plaintiff's deposit was paid over to the quartermaster of the United States army on the 23d of August, 1863, at New Orleans, in pursuance of military orders, as the funds of an officer in the rebel army, a receipt taken, and the defendants thereby discharged from all liability.

There was judgment for defendants, and plaintiff has appealed.

It appears by the evidence that, at the time stated in the answer, the defendants, in what they claim to have been a compliance with military orders, delivered to Captain J. W. McClure, acting quartermaster, the sum of three thousand five hundred dollars, in confederate notes, as the balance of deposit due to plaintiff. We are of opinion that, to enable them to successfully urge this fact as a defense to the demand of the plaintiff, they must show that the deposit made by the plaintiff was made in confederate notes. The military orders were intended to sequester property.

The first, of date August 7, 1862, directed the banks to make a statement of such deposits as belonged to officers of the army of the Confederate States (among other classes of persons), and to hold the same till further action. The sec-

and order, of date August 17, 1863, directed the banks to pay over to the proper officers of the quartermaster's department all moneys in their possession belonging to, or standing upon their books to the credit of, the same classes of persons. By an official communication of August 20, 1863, the commanding general declared "the transfer of these balances from the banks to the officers of the government is not in the light of an absolute forfeiture." Clearly, then, the military authorities attempted to sequester. If in this case that attempt was successful, the plaintiff has no claim. But if the attempt was abortive, the defendants can hardly, with good grace, complain of the plaintiff's good fortune. Now, whether the sequestration was actually made will depend on the solution of the question of fact,—whether the defendants received confederate notes on deposit from plaintiff, or lawful money.

If the deposit was made in lawful money, we cannot perceive on what principle of law or equity the defendants could discharge themselves from liability to plaintiff by the delivery to the quartermaster of confederate notes proved in this case.

It is, however, contended with much vigor by defendants, that if the United States government is satisfied with this so-called payment, the plaintiff is without interest to complain; that his claim was confiscated, and even if the bank did not pay over what it had received as a deposit, it is for the government, and not for the plaintiff, to make further demand, and upon this point they refer to the case of *Mandeville v. Bank of Louisiana*, 19 La. Ann. 392 [92 Am. Dec. 541].

That case does not properly support these views. There, a real payment of the amount of plaintiff's deposit had been made to the quartermaster in lawful money; and the court declared that this payment necessarily released the bank. In other words, the sequestration was actually made. But the delivery of confederate notes in discharge of an obligation arising from a deposit of lawful money is not a payment, without the consent of the creditor; nor would such delivery be a compliance with an order to turn over the balance of such a deposit to the quartermaster. If under such circumstances the quartermaster received confederate notes only, he failed to obtain what he was trying to obtain,—the defendants failed to give up to him what they ought to have given up.

We find it necessary to inquire, then, in this case, whether the defendants have shown as part of their defense that the deposit by plaintiff was made in confederate notes.

Upon this point the plaintiff's testimony is substantially as follows:—

"I went to the bank on the 4th of January, 1862, and as I got inside the door I was stopped by Mr. Denégre, president of the bank. I was asked by him how his son was, and he invited me into his room on the left-hand side of the entry. He asked me if I was going to make a deposit. I had in my possession at the time the check marked 'A,' and some money. I do not now recollect but what Mr. Denégre took my money and check, and had the entry made in the bank-book marked 'B,' and returned the book to me with the entry made in it. I handed the check and money to Mr. Denégre, and he had the entry made. I will not be positive as to Mr. Denégre making the deposit for me, but am positive the check marked 'A,' and four hundred or five hundred dollars which I had in my pocket, constituted the deposit made. We had no conversation in regard to confederate money. The check marked 'A' was received from Mr. Gerard Farrell for money loaned by me to him before the war. My object in drawing the money and depositing it in bank was to put it in a place of safety. I left the next day for Virginia, and considered it in a place of safety. I had nothing more to do with the matter until after the war. When Farrell gave me the check he did not say anything about confederate money. I supposed it to be the same as I had loaned him."

Cross-examined: "I was only here three days in 1862, and cannot say what the currency was at the time. All the transactions I had were in gold. I can't say whether the money I gave to Mr. Denégre was in gold, Citizens' Bank notes, or what kind it was. I was not long enough in town to find out the currency then prevailing. When I went to Virginia I took one thousand dollars in gold, and when I came back I brought back five hundred dollars. I can't say what the value of confederate currency was. In 1862, when I was in Norfolk, Virginia, gold and silver were current. . . . Where I was, I saw more gold and silver than confederate money. I did not look into the bank-book when Mr. Denégre returned it to me." Being asked, "Were you not surprised in finding the words 'current funds' instead of 'cash' written in the book?" says: "I never paid any attention to it; not being accustomed to banking business, I trusted the officers."

The check referred to in this testimony is an ordinary bank check, drawn by Gerard Farrell on the defendants, for \$3,294.90.

John G. Gaines, for defendants, testified that the currency of the country at that time was Confederate States treasury notes; that any check drawn on the bank, unless otherwise specified, would be paid in confederate money; that Farrell's check was payable and would have been paid in confederate money; that from September, 1861, it was understood with depositors that all checks were payable in confederate money, unless there was a special deposit, and that there was no special agreement with Mr. Farrell as to the payments of his checks. "In most of the bank-books," continues this witness, "a printed notice was posted, notifying all depositors that all deposits made or checks drawn would be in confederate money. The omission to post the notice in the book marked 'B' [the plaintiff's bank-book] was through error or mistake. Whenever the notice was omitted, it was done so through error." The bank-book of Farrell was put in evidence by defendants, and from that it appears that on the 16th of September, 1862, the depositor, Farrell, had a balance in the bank of \$7,481.17, in lawful money. This balance does not appear to have been reduced at the time the check to plaintiff was drawn.

It will be perceived at once that this case differs from that of *Erwin v. Bank of New Orleans*, lately decided, and resembles in some important features the case of *Weaver v. Ansfoux*, 20 La. Ann. 1.

The plaintiff, for a loan of lawful money, receives the check of Farrell, drawn upon a bank in which Farrell has a large deposit in lawful money. Farrell does not inform plaintiff that the check will be paid in confederate notes. The check does not convey any such idea. The officers of the bank, in receiving it on deposit and giving the plaintiff credit for the amount, do not so inform him. We find no reason in this record to doubt his statement that he supposed it to call for the same kind of money that he loaned Farrell before the war. As for the balance of the deposit, there is no evidence to show that it was other than lawful money.

From the evidence as a whole, we conclude that the defendants on whom the *onus* was, under the pleadings, have not established that this deposit was made in Confederate notes, and that, therefore, proof of the delivery of three thousand five hundred dollars of such notes to the quartermaster did not establish a discharge of the liability of the defendants.

It is therefore ordered and adjudged that the judgment ap-

pealed from be avoided and reversed, and that the plaintiff have judgment against the defendants for the sum of three thousand five hundred dollars, with legal interest thereon, from September 1, 1865, until paid, and costs in both courts. Rehearing refused.

EFFECT OF MILITARY ORDER ON BANK to pay officer certain money: *Mandeville v. Bank of Louisiana*, 92 Am. Dec. 541, cited in the principal case.

PAYMENT BY BANK OF DEPOSITOR'S MONEY to military officer under order discharges the bank from liability to repay the depositor: *Mandeville v. Bank of Louisiana*, 92 Am. Dec. 541, referred to in the principal case.

CALDWELL AND SHANNON v. NEIL BROTHERS.

[21 LOUISIANA ANNUAL, 342.]

PARTNERS WHO HAVE AUTHORIZED THEIR AGENT by written power of attorney to draw bills of exchange against them, and paid such bills when drawn, thus inducing the public to believe him their agent, cannot avoid payment of a bill drawn by him, on the ground that it was unauthorized by them.

WHERE ONE OF TWO PARTIES MUST SUFFER, the loss must be borne by him who contributed to bring about the state of things which caused the loss.

PROOF MUST CORRESPOND WITH ALLEGATIONS.

THE opinion states the facts.

McCay and Luzenburg, for the defendants and appellants.

Elmore and King, for the plaintiffs and appellees.

By Court, LUDELING, C. J. This appeal is taken from a judgment against the defendants as drawers of a bill of exchange for one hundred pounds, with interest and damages.

The only defense set up in the pleadings which is relied on in this court is that J. Briegleb, who drew the bill as agent of the defendants, had no authority to draw it.

Briegleb testifies as follows: "I was, at the time I drew the bill of exchange as the agent of Neil Brothers, authorized to do so. I was authorized to do so by a written power of attorney, of which a copy is annexed. Neil Brothers have recognized my authority to draw bills of exchange as their agent, on two previous occasions, by ordering J. C. Ollerenshaw, of Manchester, to accept and pay two drafts for one hundred pounds each, drawn by me previous to the one now in suit. They were paid. I drew under the authority of my power of attorney."

The power of attorney referred to was dated the 5th of June, 1856, and was signed Neil Brothers & Co. The firm of Neil Brothers & Co. was dissolved in 1859. A circular announcing the dissolution of that firm also announced that the business would be continued under the same name at Mobile and New Orleans. Briegleb continued to act as their agent under the old power of attorney, with their knowledge, and they paid his drafts drawn as agent. They thus induced the public to believe that Briegleb was their agent. If one of two parties must suffer, the loss must be borne by him who contributed to bring about the state of things which caused the loss: *Story on Agency*, 856; *Walker v. Cassaway*, 4 La. Ann. 19 [50 Am. Dec. 558]; *Frosten v. Legendre*, 3 Id. 400; 1 *Parsons on Bills*, 101. Besides, the witness Briegleb positively swears that he was authorized by Neil and Brothers to draw the bill.

Our attention has been called to a bill of exceptions taken to the ruling of the court *a quo*, excluding certain testimony. The testimony of Briegleb, plaintiffs' witness, was taken by commission.

The defendants propounded a question to him, on cross-examination, to prove that the consideration was confederate treasury notes or obligations. The question was objected to by the plaintiffs, on the ground that this defense was not made in the pleadings, and they moved to strike out the answer of the witness to this question. The district judge sustained the objection, and rejected the answer. We think the ruling was correct. The proof must correspond with the allegations.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be affirmed, and that the appellants pay the costs of the appeal.

OF TWO EQUALLY INNOCENT PERSONS, that one must suffer whose act occasioned the loss: *Maple v. Kussart*, 91 Am. Dec. 214; *Stout v. Benoist*, 90 Id. 466; *Ruis v. Norton*, 60 Id. 618.

PROOF MUST FOLLOW ALLEGATIONS; otherwise it is inadmissible: *Boswell v. Goodwin*, 81 Am. Dec. 169; *Warner v. Whittaker*, 72 Id. 65, and note; *Winston v. Taylor*, 75 Id. 112, and note 114.

AGENT'S AUTHORITY TO DRAW CHECK for principal from having drawn them before: *Cross v. People*, 95 Am. Dec. 474.

ACT OF AGENT BINDING IF WARRANTED by terms of his power: *Westfield Bank v. Cornen*, 93 Am. Dec. 573, and note 575.

By PERMITTING ONE TO HOLD HIMSELF OUT AS AGENT, principal is liable for his acts; and as to parties who have given credit before, he is liable after the agency has ceased: *Tier v. Lamson*, 82 Am. Dec. 634, note 637.

SLOCOMB v. DE LIZARDI.

[21 LOUISIANA ANNUAL, 366.]

TO REJECT DEMAND AS RES JUDICATA, the thing demanded must be the same as in the first suit, and must be founded on the same cause of action, and the contest must be between the same parties, acting in the same qualities.

ACQUIESCENCE IN JUDGMENT, HOWEVER MANIFESTED, constitutes what is decided by that judgment, *res judicata*.

IT IS IMMATERIAL HOW JUDGMENT BECOMES RES JUDICATA; what is decided by such judgment must be held to be legally true between the parties. Whether such judgment will bar another action between the same parties depends upon whether the thing demanded in the new suit is the same and founded on the same cause of action as the suit decided.

WHERE PARTNERSHIP, WHICH IS AFTERWARDS DISSOLVED by the death of one of its members, has indorsed a note or bill, notice of dishonor must be given to the surviving member in order to bind the firm, especially when he is its liquidator or representative. Notice to the executor of the deceased partner, who does not represent and has no power to administer the partnership affairs, is not sufficient.

NOTARY'S CERTIFICATE OF NOTICE OF DISHONOR is defective when it fails to state where notice was served on the indorser; it should state that notice was made at the indorser's residence or place of business.

IF NOTICE OF DISHONOR IS NOT GIVEN, it is presumed that the indorser is prejudiced by such omission, and he is discharged from liability.

PARTNER IN COMMENDAM DOES NOT BECOME RESPONSIBLE for liabilities created by the active partner after the expiration of such partnership, from the fact that he fails to have a settlement of its affairs; nor is such partner liable as a general partner if he allows his money to remain in the firm after its expiration, believing himself to be a partner in *commendam*, and liable only for the amount invested, unless he has done or permitted some act which could have induced creditors to believe him to be a general partner.

THE opinion contains the facts.

Bradford, and Lea and Finney, for the plaintiff and appellant.

Hunt, Morgan, and Le Gardour, for the defendant and appellee.

By Court, LUDELING, C. J. A judgment was rendered in this cause at the last term of this court by our predecessors, maintaining the defendant's plea of *res judicata*.

Having granted a new hearing, our first duty is to examine whether or not this exception is well founded.

The plaintiff seeks to recover from the defendant eight thousand dollars, with eight per cent per annum interest on four thousand dollars thereof from the 11th of April, and on four thousand dollars thereof from the 18th of April, 1861, being

the amount of two premissory notes drawn and indorsed by Hugh M. Keary, and indorsed subsequently by Juan Y. de Egana, upon the ground that these indorsements were made by the commercial firm of J. Y. de Egana, and that the defendant was, at the time they were made, a general partner in said firm.

The defendant denied all the allegations in plaintiff's petition, and especially that there ever existed between him and Egana any partnership, as alleged by the plaintiff. Subsequently he filed the exception of *res judicata*, and to support it, he pleaded the judgment of the second district court of New Orleans, rendered on the 11th of January, 1864, in the matter of the succession of Juan Y. de Egana.

It is true, as stated by the counsel for defendant, that the authority of the thing adjudged is not a mere technicality of the law, but it is a principle of jurisprudence which is founded in the interest of society. It rests upon the broad and necessary doctrine that the disputes of men must at some time have an end, and it is therefore favored by the law

But in order to justify courts of justice to reject a demand as contrary to the authority of a thing adjudged a legal verity, it is necessary that the thing demanded should be the same as in the first suit, that the demand should be founded on the same cause of action, and that the contest should be between the same parties, acting in the same qualities. Thus identity of the things demanded, identity of the causes of action, and identity of the parties and of their qualities, are the conditions upon which alone the legal presumption is established in favor of the thing adjudged: Civil Code, arts. 2264, 2265; Marcadé, vol. 5, p. 156

What, then, was the thing demanded in the suit in which the judgment of the 11th of January, 1864, was rendered? As between Caballero, the executor, and Lizardi, the liquidator, it was to make the latter return to the former the property of the succession of Egana, in the event that the court should decide that it had been improperly delivered to him. On the 11th of April, 1863, in consequence of proceedings by creditors of the succession of Egana against him, the executor filed a petition calling on the liquidator to file an account of his administration. The liquidator was ordered to file his account, which he did on the 30th of May, 1863. The executor opposed this account, prayed that it be rejected, and that in the event that the court should decide that the executor had unlawfully

turned over to the liquidator the money and property of the succession, that the liquidator should be ordered to return them to him. It is the prayer which indicates the thing demanded: *Kemper v. Hulick*, 16 La. 44; *Hood v. Legrest*, 1 Rob. (La.) 109.

The prayers of the oppositions filed by the creditors do not show that Lizardi was sought to be made liable as a general partner.

But we deem it unnecessary to examine the oppositions of the creditors further, for they certainly did not represent anybody but themselves. And if we admit that the executor did represent in those proceedings all the creditors, we have seen that the thing demanded in that suit was not to make Lizardi responsible for the debts of the firm of J. Y. de Egana, as a general partner.

The demand must be founded on the same cause of action.

What is the cause of an action? It is the immediate foundation of the right which one claims to exercise. It is the immediate basis of the demand, and hence we must guard against confounding the cause of action, either with the various circumstances which constitute the mediate bases, or simple means which produce this last cause, or with the right itself, which is the object of the demand.

The cause of action in this suit is the alleged indorsement of two promissory notes by Lizardi, as a member of the commercial firm of J. Y. de Egana.

The cause of action between Caballero and Lizardi was the wrongful possession and unlawful administration of the property of the succession of Egana by Lizardi.

It is true that some of the creditors charged in their oppositions that Lizardi was a general partner, to show fraud and complicity between him and the executor; but this was not — nay, it is difficult to conceive how it could have been — the immediate cause of the action between the executor, creditors, and liquidator.

Marcadé says: "Il ne faut pas confondre la cause avec les éléments qui viennent produire ou justifier cette cause. Sans doute, il y aura là des principes du droit demandé, et dès lors des bases de l'action par laquelle on réclame ce droit; mais ce sont des bases éloignées et médiate, des causes de la cause, que la loi n'aurait pas pus prendre ici en considération, sans éterniser les procès et depouiller de toute efficacité les décisions judiciaires. Il n'y a pas à se préoccuper de ces bases

éloignés, et la cause ne se trouve que dans la base dernière, dans le principe immédiatement générateur que les Romains appelaient fort exactement *causam proximam actionis*": Vol. 5, p. 165. "La règle est donc de ne considérer ici que la base immédiate. Mais biens entendre, dès là que cette base immédiate n'est pas la même dans les deux demandes, il n'y a plus chose jugée, et la demande nouvelle est recevable": Marcadé, vol. 5, p. 166.

The demand must be between the same parties, and formed by them against each other in the same quality.

Lizardi was sued in the first suit in his fiduciary capacity as liquidator; in this cause he is sued personally as a general partner of a commercial firm.

In the first case he was proceeded against by Caballero, executor of Egana; now he is proceeded against by a creditor of the firm.

But it is said that Caballero, executor, represented the creditors, and that the homologation of his account and tableau bars all further inquiries as to the matters included in the account. This is true, with some limitations. The effect of such a decree protects the executor or administrator in making the payments ordered or approved, and from liability for his gestion so far as that is approved; and it settles the claims of creditors against the succession as to the funds distributed, unless there be other creditors who were not placed upon the tableau: *West v. Creditors*, 4 La. Ann. 450; Civ. Code, art. 1176.

Again, it is contended that the plea of *res judicata* must be held to be good, because the plaintiff acquiesced in the judgment by receiving a part of the fruits thereof. There is no doubt that acquiescence in a judgment, however manifested, constitutes what is decided by that judgment the thing adjudged; that is, it becomes thereby a final judgment, from which there can be no appeal: Civ. Code, art. 3522.

But that is all. If a judgment which had become final by the lapse of time could not be pleaded as a bar to another action on account of the want of one or more of the conditions, which we have seen are necessary to give it the authority of the thing adjudged, it could not be set up as an estoppel if the judgment had become final by acquiescence.

It is immaterial how a judgment becomes *res judicata*; what is decided by such a judgment must be held to be legally true between the parties to the suit. And whether that judgment can be a bar to another action between the same parties

will depend on whether the thing demanded in the new suit be the same, and founded on the same cause of action as in the suit decided. It is not necessary, therefore, to determine whether or not Mrs. Slocomb acquiesced in the judgment pleaded in bar of this action.

The "authority of the thing adjudged takes place only with respect to what was the object of the judgment": Civ. Code, art. 2265.

The object of the judgment in the matter of the succession of Egana was to compel Lizardi to restore to the possession of the executor the property which Lizardi had received from him. "Il est bien entendu que c'est uniquement dans le dispositif d'un jugement, et non dans ses motifs, que se trouve la chose jugée. . . . Bien plus, le dispositif lui-même ne présente la chose jugée que pour les points qui sont vraiment décidés, et non pour ceux que ne s'y trouvent que comme de simples énonciations; c'est en examinant les questions sur lesquelles les parties étaient en désaccord et que leur débat présentait à décider, le *quid judicandum*, que l'on arrivera facilement à comprendre ce qui a été jugé, le *quid judicatum*": 5 Marcadé, 155; Serrey's Code Annoté, notes 58-60, art. 1351, of the Code Napoleon.

In *Jeannin v. De Blanc*, 11 La. Ann. 466, this court said: "As this right is not put in controversy by the pleadings, so it is not barred by the judgment": *Jackson v. Tiernan*, 15 La. 485; *Davis v. Millaudon*, 17 La. Ann. 104.

The exception should have been overruled.

On the Merits.—Assuming that a commercial partnership existed, as alleged by the plaintiff, we think that the defendant cannot be held liable under the indorsements for want of due notice of the dishonor of the notes.

The partnership, if it existed, would have been dissolved by the death of Egana, in 1860: Civ. Code, arts. 2847, 2851; Story on Partnership, secs. 317, 319.

Manuel J. de Lizardi was appointed liquidator of the commercial firm, and he was put in possession of the property of the firm, which he proceeded to administer. Under these circumstances, to whom was it necessary to give notice of the dishonor of the notes? We think the notice should have been given to the liquidator, who was in this case the surviving partner: Story on Bills, sec. 305.

Mr. Justice Story says: "Notice to one of several partners is notice to all the partners, and the notice may be given to

any partner, either at his usual place of business or at his dwelling-house, or at the usual place of business of the firm. . . . In cases of partnership, notice should be given to the firm; but notice to either of the partners will be notice to the firm. . . . If, in case of a note of a firm, one of the firm die, notice should be given to the surviving partner. Whether notice to the personal representative of the deceased would be valid does not appear to be settled by the authorities": Story on Promissory Notes, sec. 810. In his work on bills, he says: "If one partner is dead, notice should be given to the survivor": Story on Bills of Exchange, sec. 389; *Cayuga County Bank v. Hunt*, 2 Hill, 635.

Mr. Parsons says: "Notice to one member of a partnership which indorses a note or bill is notice to all, because each partner represents the interests of all the other partners and of the partnership, and the same has been held where notice has been given after dissolution and publication. So if one of the firm dies before maturity, notice to the surviving partner is sufficient to hold the estate and legal representatives of the deceased": 1 Parsons on Notes and Bills, 502.

The reason assigned by Mr. Parsons for holding that notice to one of the partners is notice to all is because he represents the other partners and the firm.

Who represented the partners and the firm after the appointment of Lizardi as liquidator? It would seem that the reason upon which is based the rule which requires notice of non-payment to be given to the indorser—to wit, to enable him to take the necessary measures to obtain payment from the parties respectively liable—would require the notice to be given to the surviving partner, especially if he be the liquidator or representative of the firm. How could he know that the notes, of which the firm was indorser, had not been paid when due, if the holder gave him no notice of it? How was he to know, without notice, that the holder looked to the indorser for payment? The executor had no power to administer the partnership affairs, nor did he represent the partnership; how, then, could a notice served upon him be regarded as a notice to the firm or to the surviving partner? *Bank of Louisiana v. Smith*, 4 Rob. (La.) 276; *Christmas v. Fluker*, 7 Id. 13; *New Orleans etc. R. R. Co. v. Kerr*, 9 Id. 124 [41 Am. Dec. 323].

The only evidence in regard to the notices of protests is to be found in the certificates of the notary who protested the notes. The first certificate states that the notary served the

notice in the following manner: "By directing the one for Hugh M. Keary, drawer and indorser, to him at Cheneyville, Louisiana, which letter I deposited prepaid in the post-office in this city, on the same day of said protest; and by delivering the one for Juan Y. de Egana, in duplicates, one to J. M. Caballero, the testamentary executor of said Egana,—the whole by my deputy, Lawson L. Davis,—on the day below written; and by delivering the one for Cora A. Slocomb to her personally, by Lawson L. Davis, my deputy, on the day below written." The other certificate states that he notified the parties by directing the one for Hugh M. Keary in the manner stated above, and "by delivering the notices for Juan Y. de Egana, as follows, to wit: one to Mr. Dubreuil, the partner of the agent of the liquidator of said firm of Juan Y. de Egana, and another to the book-keeper of Mr. Caballero, executor of said Egana, at his office, he not being in on the day below written."

The first certificate shows that an attempt was made to notify the surviving partner or liquidator. The second certificate shows that an attempt was made to serve a notice on the liquidator, but the service was improperly made. In *Union Bank v. Smith*, 9 Rob. (La.) 75, this court held that a certificate that a notice was served "by leaving it with the cashier of a bank, the indorser's elected domicile," is insufficient,—*non constat* that the notice was not given to him at some other place, or that it was addressed to him there. So a certificate that "notice was given by a letter delivered to the indorser's barkeeper, he not being in," was held to be defective in not stating that the service was made at the indorser's residence, or place of business: *Saul v. Brand*, 1 La. Ann. 95; *Union Bank v. Campbell*, 2 Id. 759.

The certificate does not state where the notice was served on Mr. Dubreuil, the partner of the agent of the liquidator. "If notice be not given, it is a presumption of law that the indorsers are prejudiced by the omission": Story on Bills, sec. 284. And they are discharged from all liability.

But as it is possible that the notary did give the notice to the liquidator, and that this fact might be established on another trial, it might be our duty to render a judgment of nonsuit only. This, therefore, obliges us to examine another question raised by the pleadings.

The plaintiff alleges that, at the time when the notes sued on were indorsed by Juan Y. de Egana, there existed a gen-

eral commercial partnership between Egana and Lizardi carried on under the firm name of Juan Y. de Egana, and that Lizardi is responsible, *in solido*, with the succession of Egana for them.

In 1848, a commercial partnership was established in the city of New Orleans, in which Manuel J. de Lizardi was a partner *in commendam*. The business was carried on in the name of Juan Y. de Egana, and the partnership was to terminate in September, 1853. The act of partnership was duly recorded. The affairs of this partnership had not been settled at the period when Egana died. In 1860, Lizardi gave a power of attorney to his nephew to liquidate the affairs of the firm in case of the death of Egana; and after the decease of Egana, Lizardi, through his agent, filed a petition claiming to be appointed liquidator of the firm, as the surviving partner *in commendam*.

The counsel for the plaintiff infers from this that there existed a commercial partnership; that as it is proved that no written act of partnership existed or was recorded other than the one which expired in 1853, therefore Lizardi was a general partner, and he is bound, *in solido*, under the indorsement.

We are not prepared to adopt these inferences. It is not correct to say that because Lizardi thought and said, in 1860, that he was a partner *in commendam*, when in truth he may not have been, therefore he was a general partner. His admission is, that he was a partner *in commendam*. It would be illogical and unjust to construe this admission so as to make him a general partner if he were not what he supposed he was. The admission cannot be divided. It either establishes the fact that he was a partner *in commendam*, or nothing. His opinion on the subject could not affect the facts or the law governing the case.

The question is then presented for decision, Does the partner *in commendam* become responsible for the liabilities created by the active partner after the expiration of the term of the partnership *in commendam* by failing to have a final settlement of its affairs *ipso facto*?

We say this is the question presented, for there is no proof, nor is it alleged that, prior to the death of Egana, Lizardi interfered with the business of the concern, or permitted his name to be used in it, or did any other thing which, under the provisions of the Civil Code, would make him responsible as a

general partner. We do not deem it necessary to decide whether a partnership *in commendam*, once duly recorded, may be extended or prorogued after the limitation thereof fixed in the recorded act without complying with the forms set forth in article 2849 of the Civil Code. Whatever might be the consequences of such a state of facts, as between the partners, we cannot sanction the doctrine that one who has supposed that the partnership *in commendam* continued, in which he had placed his money with the sanction of the law, that he should not be responsible beyond that sum, should be held to be a general partner, and liable as such, without having done anything which could have induced creditors to believe that he was a general partner, or done or permitted any of the acts which the code declares will render him responsible as a general partner. The code says: "In no case, except as in hereafter expressly provided, shall the partner who has no other interest in the concern than that of a partner *in commendam* be liable to pay any sum beyond that which he has agreed to furnish by his contract": Civ. Code, art. 2813.

Here, then, is a textual provision of the code, supported by the well-recognized principle that courts of justice cannot impose a penalty which is not imposed by the law itself, which prohibits us from changing a partner *in commendam* into a general partner, except in the cases expressly stated. These cases are mentioned in articles 2816 and 2820, and they are the following: When the original contract has not been made in writing, and recorded, or when the partner *in commendam* takes any part in the business of the partnership, or permits his name to be used in the firm, or knowingly allows any single person to whom he has made the advance to add any words or name or firm that may imply that he has other partners besides the partner *in commendam*, when in fact he has none.

These views are supported by commentators on the Code Napoleon, and by the French tribunals. Dalloz says (v. 40, v. Société, p. 682, No. 1420): "Les tribunaux n'ont pas admis cette prétention. Ainsi il y a été jugé que, lorsque deux personnes qui avaient contracté, pour un temps limité (trois ans, par exemple) une société en commendite, ont, à l'expiration de ce temps, continué pendant une année les affaires communes sur les bases précédemment établies, mais sans remplir les formalités légales de publication, cette continuation n'a pas changé, même à l'égard des tiers, la qualité des associés,

et n'a pas établi de solidarite entre eux." (Paris, 17 Avril, 1839.) Delangle, vol. 2, pp. 225, 226.

This position seems to be in consonance with law and equity. In conformity with the law, because it is nowhere declared by the law that a failure to record the prorogation of the partnership shall change the partner in *commendam* to a general partner; and in conformity with equity, because having always confined himself within the limits prescribed by law to a partner in *commendam*, third parties could have no pretext to claim that he was ever bound otherwise than in the manner shown by the recorded act of partnership in *commendam*.

We think the defendant is not liable under the indorsements on the notes made by Juan Y. de Egana.

It is therefore ordered, adjudged, and decreed that the judgment of this court rendered on the twenty-third day of June, 1868, be annulled, that the judgment of the district court be affirmed, and the appellant pay the costs of the appeal.

HOWELL, J., took no part in this decision.

NOTE.— This case was pending on appeal before the supreme court under the constitution of 1864. On the 23d of June, 1868, a decision was had through Mr. Justice Ilaly, the organ of the court, sustaining the plea of *res judicata*, and affirming the judgment of the lower court. A rehearing was granted by that tribunal, and the case was transferred to the present court for examination on the rehearing. As the first opinion is overruled by this decision, its publication in the reports is omitted.

JUDGMENT WHEN BECOMES RES JUDICATA: *Griffin v. Seymour*, 83 Am. Dec. 396, and note; *Joyce v. McAvoy*, 89 Id. 172, and note.

TO MAKE MATTER RES JUDICATA, there must be identity of subject-matter of suit, cause of action, persons, and parties, and of the quality in the persons for or against whom the claim is made: *Benn v. Hines*, 89 Am. Dec. 594, and note 596.

PITRE v. OFFUTT.

[21 LOUISIANA ANNUAL, 676.]

COMMON CARRIER OF CATTLE BY STEAMBOAT is liable for their loss during transportation, if occasioned by negligence or want of care on the part of the officers of the boat.

USAGE OR CUSTOM AMONG STEAMBOATS, that they are not liable for the loss of live-stock during transportation, will not relieve them from responsibility for loss through negligence, unless knowledge of such usage or custom was brought home to the shipper.

THE opinion contains the facts.

Dupre and Garland, for the defendants and appellants.

Moore and Morgan, for the plaintiffs and appellees.

By Court, TALIAFERRO, J. This is an action brought by the plaintiffs against the defendant and others, owners of the steamer *Aline*, for the value of eighty-seven calves shipped by them on the steamer destined to New Orleans, and which they allege the defendants failed to deliver according to their agreement. They claim \$870, the value of the stock and interest on the amount claimed.

The answer is a general denial of the plaintiff's allegations. Judgment was rendered in favor of the plaintiffs for \$522, with legal interest from judicial demand.

The defendants have appealed.

The facts seem to be, that the cattle were shipped on the steamer at or near the town of Washington, on the Courtableau, and that, finding great difficulty at the low stage of water then existing to pass bars and other obstructions at a lower portion of the bayou called Little Devil, the cattle were turned off the boat to lighten her. The country around for a considerable distance being low, marshy, and uninhabited, the cattle wandered off without any effort being made by the managers of the boat to have them taken care of.

It is shown that it is not usual for boats to give bills of lading for freight of this kind; it appears that boats were in the habit generally of transporting beef cattle to New Orleans on this route, and that the plaintiff's lot of calves was taken on board the *Aline* for the purpose of being carried to that market. A witness, formerly a clerk on board the steamer, testifies that the steamers *Aline* and *Perret* "never gave receipts for stock, and never were responsible for the lives of stock shipped thereon."

This, he states further, "is a well-understood regulation, followed by all steamboats in the cattle trade," and adds that he is sure the boats named never made an exception.

This is the only witness who mentions such a usage as the one he spoke of, and we are unable to find that a knowledge of the existence of such a regulation, even if available for the defendants, was brought home to the plaintiffs.

The officers in charge of the steamer received the stock on board with full knowledge of the impediments in the way of

navigation, and of the vexations which the Little Devil had in store for them. We see nothing in the defense which will justify an exemption of the defendants from the responsibilities of common carriers.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be affirmed, with costs: *Price v. Ship Uriel*, 10 La. Ann. 413; *Watts v. Steamboat Saxon*, 11 Id. 43, 427; *Hatchett v. Steamer Compromise*, 12 Id. 783 [68 Am. Dec. 782].

LIABILITY OF CARRIER OF ANIMALS: Note to *Clarke v. Rochester etc. R. R. Co.*, 67 Am. Dec. 208-217; *Peters v. New Orleans etc. R. R. Co.*, 79 Id. 578.

USAGE LIMITING LIABILITY OF COMMON CARRIER, EFFECT OF: Note to *Geornor v. Withers*, 60 Am. Dec. 99; *Cox v. Peterson*, 68 Id. 145, and note 148.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

BETHEL STEAM MILL COMPANY · v. BROWN.

[57 MAINE, 1.]

SYMBOLICAL DELIVERY OF LARGE NUMBER OF LOGS landed on a stream, preparatory to driving, is sufficient delivery, even as against subsequent purchasers, where a survey of the logs is made by a person mutually agreed upon by the parties to the sale, and the vendee's mark is put upon the logs as they are thus landed, although the vendor is bound by the contract of sale to deliver the logs at a specified place which is many miles below the landing.

TROVER for a number of logs. The facts are stated in the opinion.

Davis and Drummond, for the plaintiffs.

W. L. Putnam, for the defendants.

By Court, **BARROWS, J.** The plaintiffs had a contract with one Meserve, for the purchase of from two million to two million five hundred thousand feet of spruce logs, which, according to the contract, Meserve was to deliver in the Androscoggin River, below Errol dam, as soon as the ice was out of the river in the spring of 1866. The logs were all to be distinctly marked with the plaintiffs' mark on each end, with an axe, and "to be scaled by Isaac Lunt, of Oldtown, and settled according to his survey."

By the same contract, the plaintiffs agreed to pay Meserve "six dollars per thousand feet, one half as cash, May 1st, the other half as cash, November 1, 1866, and to make advances from time to time, as the logs are put into the river as herein-

before mentioned," interest to be reckoned on the advance payments so made, and four per cent additional on the fulfillment of the contract on Meserve's part, which last-named sum was declared to be in consideration of accepting payments on time for half the logs, and for putting in one half the amount of the contract full length.

Meserve exhibited the contract to Standley and Evans, who had bought standing timber on the Chickawalapy, — a tributary of the Androscoggin, — and they agreed to become jointly interested in the contract with him, and to turn in their logs in fulfillment of the contract, at the same price that he was to receive, and get them into the Androscoggin in season to go on with the rest of the drive. They cut and landed at one place on the bank of the Chickawalapy, and on the ice in the stream, six hundred and five thousand feet, according to the scale and survey furnished them by Lunt, the surveyor named in the contract, who came from time to time to the landing-place on the Chickawalapy to survey them. He was employed by the plaintiffs, and it was part of his duty to see that the plaintiffs' mark was put upon the logs. The plaintiffs' mark was put upon each log there landed, as stipulated in the contract, and the plaintiffs made advance payments from time to time, as agreed upon. It so happened that two hundred and thirty-three thousand feet of the logs so landed and marked on the Chickawalapy did not get out of that stream in the spring of 1866, in season to go into the drive.

In May of that year, when Meserve first went to settle with the plaintiffs' agent, the logs on the Chickawalapy had not been started out, and the plaintiffs' agent declined to settle "until the drive had taken in all the landings."

In June, 1866, Meserve came again to settle, bringing with him a letter from Lunt to the plaintiffs' agent, in which Lunt states that he had "got the logs all in the drive, except about one hundred thousand feet on the Walipy."

Thereupon a settlement took place, in which all the logs, including the six hundred and five thousand feet landed by Evans and Standley on the Chickawalapy, and amounting to about two million two hundred thousand feet, are charged to the plaintiffs, with the contract price carried out, "less one hundred thousand feet left in Chickawalapy."

In August, 1866, Evans sold the two hundred and thirty-three thousand feet, which were actually "left in the Chickawalapy," to the defendants, who were notified by the plaintiffs'

agent, before they paid Evans for the logs, that the plaintiffs claimed them as their property, and should hold the defendants responsible. The defendants took them, notwithstanding this notice; and hence this suit, which must turn upon the question whether the plaintiffs owned the logs which were "left in the Chickawalapy."

The position taken by the defendants is, that the contract remained executory until delivery in the Androscoggin River, below Errol dam, the place named in the contract as the place of delivery, and that the property in the logs did not pass from the vendors to the plaintiffs for want of a delivery.

To determine whether this property had passed to the plaintiffs, it is necessary to consider, not merely the stipulations in the contract itself, but the subject-matter of it, and the attendant circumstances also; e. g., the situation of the merchandise contracted for, and the usual course of the trade in it, and the subsequent particular acts and dealings of the parties to the alleged sale in relation to it.

The question of transfer to and vesting of title in the purchaser always involves a question of the intention of the contracting parties; and it is to be ascertained whether their negotiations and acts are evincive of an intention on the part of the seller to relinquish all further claim or control as owner, and on the part of the buyer to assume such control with its consequent liabilities.

The question is one by no means free from difficulty, where, as here, there are acts and stipulations of the parties looking each way.

In general, however, it may be well to premise the law regulating the delivery of property upon a sale accommodates itself to the necessities of the business and the nature of the property, making a symbolical delivery sufficient where nothing but a constructive possession can ordinarily be had, and by no means overlooking the possibility that the merchandise sold may remain in possession of the seller for certain specific purposes, among which are transportation and delivery at another place, where the property in it has actually passed from him, and vested in the purchaser, without affecting the validity of the sale: *Boynton v. Veazie*, 24 Me. 286; *Terry v. Wheeler*, 25 N. Y. 520. The fact that the logs had not arrived at the point in the river where, by the contract, Meserve had undertaken to deliver them, cannot of itself be deemed conclusive that the property in the logs had not passed to the

plaintiffs. Doubtless it is evidence strongly tending to that conclusion, and unless counteracted by the evidence of the other acts and doings of the parties to the trade, and of the usual course of business among dealers in logs, would be fatal to the plaintiffs' claim.

It is strongly argued that the plaintiffs were not bound to receive any logs that were not boomed in the Androscoggin River, below Errol dam, as soon as the ice was out of the river in the spring of 1866, and that these logs not being so situated cannot be looked upon as going into the fulfillment of the contract.

Looking with not a little force to the same result is the fact that, though the whole six hundred and five thousand feet of the logs in the Chickawalapy were charged to the plaintiffs in the statement of the account, on settlement, a deduction was made of the whole contract price for one hundred thousand feet, supposed to be the quantity left back. These are the circumstances which make most strongly against the plaintiffs' title.

If we could accept as true Meserve's testimony as to what transpired between himself and the plaintiffs' agent at the time of the adjustment, we should be disposed to hold that the property in the logs in controversy was not intended to pass, and did not pass.

But we cannot overlook the fact that Meserve and Evans both must have known, when Evans made the sale of the two hundred and thirty-three thousand feet of logs to the defendants, that they had already received their pay for one hundred and thirty-three thousand feet of them from the plaintiffs, and we think that the position in which they stand in this particular tends strongly to discredit their statements as witnesses.

The testimony of the plaintiffs' agent (which we accept as more likely to be true than Meserve's version of this part of the transaction) is: "I told him the logs were ours; that if they came out the next spring they probably would not be injured any, but if they lay there two or three years they would injure a great deal, and probably be very nearly spoiled; I told him there would have to be a large reduction made on the logs if they lay back two or three years."

Here is no disclaimer of title to the logs that were left back, or of liability to pay for them at the contract price; but it is rather to be construed as a reminder to Meserve that damages

would be claimed of him in offset if there should be a long delay in the fulfillment of his stipulation to have them below Errol dam.

Let us now see what there is which goes to show that it was the intention of these parties that the property should pass, and that it did pass to the plaintiffs, before arriving at the point in the river where the vendor undertook to place it.

We have no doubt that Standley and Evans, by their arrangement with Meserve, and the consequent turning in of these logs to make up the amount called for by the contract, stood in such a relation to the plaintiffs that the property in these logs passed to the plaintiffs, if any of Meserve's logs, similarly situated, would have passed. Whether they became partners with Meserve or not (a point we deem it unnecessary to decide), it is clear that they gave him ample authority to dispose of these logs, according to the terms of his contract with the plaintiffs, an authority which could not be revoked, if in pursuance of it the title to the logs had already vested in the plaintiffs. An important stipulation in its effect upon this question of when the property passed is the one which declares that the logs are to be settled for according to Lunt's survey. That survey was made as the work of filling the contract progressed, from time to time, at the landings where the logs were delivered, with the knowledge of all parties, and it includes the logs in controversy. It was according to that survey that the plaintiffs were bound to pay. The logs were to be marked as the plaintiffs might direct, and the testimony is, that each of the logs in controversy had the Bethel Steam Mill Company's mark placed upon it at the landing. We cannot believe that the parties thus contracting and proceeding could have had any other intention or understanding than that the property should pass, and be considered as delivered, when the marking and survey were completed; and it would seem that if the delivery below Errol dam, in the Androscoggin River, constituted a condition precedent in the contract, it was waived, and delivery accepted at the landings, where the survey and marking took place, with the understanding that Meserve would still fulfill his agreement to run them down to the point designated as a condition subsequent.

A symbolical delivery of property thus situated was sufficient. It was only a constructive possession that could be expected to be taken. Lunt, though mutually agreed upon as the surveyor, was in the employ of the plaintiffs, and it was

made his business specially to see to it that all the landings were turned into the river. He was clearly the agent of the plaintiffs for this purpose, and the act constituted as perfect a delivery as the nature and situation of the property would permit. We think that the survey and marking of the logs in controversy, when they were so placed as to be liable to be mixed with other logs bearing the plaintiffs' mark, must be held to be a sufficient delivery.

How otherwise could there be any security for the seller, or any possibility of ascertaining what he was entitled to receive? How otherwise could effect be given to the stipulation for a settlement according to the survey? The rough estimate by Lunt of "about one hundred thousand feet left back" was plainly no part of the survey. It might serve for a basis upon which to regulate the advance payments, and in conformity with it notes were given in June covering more than half the amount of the logs in controversy, while apparently the payment for the balance was left unadjusted until it could be ascertained how much damage the plaintiffs might suffer and be entitled to recoup by the failure of Meserve to bring them into the spring drive.

In fine, when we look at the nature of the business, and the manner in which it must necessarily be conducted, we see no safety for parties engaged in it from perpetual controversies, in which it would be very nearly impossible to arrive at any satisfactory conclusion, if we do not hold that, in the absence of the clearest evidence to the contrary, the making of a survey which is to be conclusive on the parties, and the affixing of the purchaser's mark to all the logs, when they are once put afloat, so as to be liable to be mixed with others bearing the same mark, is to be deemed a sufficient delivery to vest the property in the purchaser.

We think this must be our conclusion, independent of the evidence of custom offered in the case,—a custom eminently reasonable and proper, if not indispensable, in the carrying on of the business.

For reasons similar to those above suggested, it would seem, it was held in *Walden v. Murdock*, 23 Cal. 540 [83 Am. Dec. 135], that a sale of cattle roaming over uninclosed plains with those of other owners, if made in good faith, is not invalid, as against creditors of the vendor, for want of delivery, until the purchaser has had a reasonable time to separate and brand them; and that branding the cattle by the purchaser is a good

delivery to him, though he allows them afterwards to remain in the same uninclosed range of pasture.

In the view which we take of this case, the fact that the logs were still in the possession of the vendors, for the purpose of being driven to a point lower down on the river than the place where the survey and marking took place, cannot avail the defendants.

If merchandise sold remains in the possession of the vendor for a specific purpose, as part of the consideration, the sale being otherwise complete, the possession of the vendor is to be considered the possession of the vendee, and the delivery as sufficient to pass the title even against subsequent purchasers: *Hotchkiss v. Hunt*, 49 Me. 213.

Judgment for plaintiffs for \$1,759.23.

APPLETON, C. J., and CUTTING, WALTON, DICKERSON, and DANFORTH, JJ., concurred.

DELIVERY OF PONDEROUS ARTICLES, WHEAT SUFFICIENT: See *Cummings v. Griggs*, 87 Am. Dec. 482; *Walden v. Murdock*, 83 Id. 135; *Hall v. Richardson*, 77 Id. 303, note 310, where other cases are collected.

GOODWIN v. HARDY.

[57 MAINE, 143.]

FUNDS OF CORPORATION ARE TO BE DISTRIBUTED AMONG THOSE WHO ARE ITS STOCKHOLDERS at the time when the dividend is declared, no matter when such funds accrued.

BILL in equity. The opinion states the case.

W. H. Y. Hackett and Nathan Webb, for the complainants.

F. W. Hackett, for certain stockholders.

By Court, APPLETON, C. J. This is a bill brought under the provisions of the revised statutes of 1857, chapter 77, section 8, for the purpose of determining "the mode of executing a trust."

The facts are conceded to be truly set forth in the bill.

It appears that on the first day of April, 1847, by deed of indenture of that date, the Portland, Saco, and Portsmouth Railroad Company granted to the Eastern Railroad Company and to the Boston and Maine Railroad Company "the liberty, as the general agent and attorney irrevocable of the said Portland, Saco, and Portsmouth Railroad Company, to maintain,

use, operate with, and employ exclusively, the said railroad of said Portland, Saco, and Portsmouth Railroad Company, in the state of Maine and every part thereof, for the transportation of persons and property during the continuance of the agreement between the parties under said indenture, and to receive and take, from time to time, and at all times during the continuance of said agency and contract under said indenture, all the income, issues, and profits of said Portland, Saco, and Portsmouth Railroad Company, and all tolls and fares whatsoever for the transportation of persons, freights, property, and things upon said railroad, or any part thereof, which had theretofore been or then were established, or at such reasonable rates as, having in view the best interests of all persons concerned therein, should be caused or procured to be established for the time being," etc. The Eastern Railroad Company and the Boston and Maine Railroad Company, on their part, agreed that they "would, during the continuance of said agency and contract under said indenture, pay, or cause to be paid, semi-annually, in the months of June and December in each year, to the treasurer of said Portland, Saco, and Portsmouth Railroad Company, the sum of three dollars, in gold or silver coin of the currency of the United States, for each and every share of the capital stock of the said Portland, Saco, and Portsmouth Railroad Company, the first payment to be made in June in the year of our Lord one thousand eight hundred and sixty-seven."

The Eastern Railroad Company and the Boston and Maine Railroad Company made their semi-annual payments according to the times of their contract, until June, 1863, when they refused to pay "in gold or silver coin of the currency of the United States," and "claimed the legal right to and did make payment to the treasurer of the said Portland, Saco, and Portsmouth Railroad Company, for the time being, for the use of the stockholders of said Portland, Saco, and Portsmouth Railroad Company, in legal tender notes, the sum of three dollars for each and every share of the capital stock of said Portland, Saco, and Portsmouth Railroad Company," said legal tender notes being of less value than the gold or silver coin of the currency of the United States. These payments were received by the treasurer of the Portland, Saco, and Portsmouth Railroad Company under protest, he "asserting and insisting upon the right of the stockholders to receive the sum of three dollars in gold and silver coin of the currency of the United States."

The Eastern Railroad Company and the Boston and Maine Railroad Company continued, notwithstanding the protests of the Portland, Saco, and Portsmouth Railroad Company, to make their several semi-annual payments in legal tender notes, up to June, 1869; and the sums so received were paid and distributed "to the several stockholders, from time to time, being respectively entitled to have and receive the same in their respective proportions."

The Portland, Saco, and Portsmouth Railroad Company claimed of the Eastern Railroad Company and the Boston and Maine Railroad Company "payment of the difference between the value of the said several payments in legal tender notes of the United States, . . . and the value of payments in gold and silver coin of the currency of the United States." On the 4th of August, 1869, this claim was compromised by the payment, by the Eastern Railroad Company and the Boston and Maine Railroad Company, to the treasurer of the Portland, Saco, and Portsmouth Railroad Company, the sum of one hundred and eighty thousand dollars, "in full discharge and satisfaction of all claims for diminution of payments before that time due and payable, by reason of the same having been made in legal tender notes of the United States, instead of in gold or silver coin of the currency of the United States."

The money thus received is in the treasury of the Portland, Saco, and Portsmouth Railroad Company. No dividend has been declared. The question presented is to whom this money belongs,—whether to the several and respective stockholders owning shares when the several semi-annual dividends were paid, or to those who may be stockholders at the time when a dividend, embracing the sum of one hundred and eighty thousand dollars, received by way of compromise, shall be declared.

As to this we have no doubt. The stockholders have no claims to a dividend until it is declared. Until that time, it belongs to the corporation, precisely as any other property it may own. When a distribution of the funds of a corporation, whether of the whole or a part, is ordered, it is to be made between those who, at that time, are the owners of its stock. The law on this subject is very clearly stated by Mr. Justice Sargent, in *March v. Eastern R. R. Co.*, 43 N. H. 520. "The purchaser of a share of stock in a corporation," he remarks, "takes the share with all its incidents, and among these is the right to receive all future dividends,—that is, its proper-

tional share of all profits not then divided; and as we understand the law and the usage of such corporations, it is wholly immaterial at what time and from what sources these profits have been earned; they are incident to the share, to which a purchaser becomes at once entitled, provided he remains a member of the corporation until a dividend is made."

It is therefore declared that the sum of one hundred and eighty thousand dollars, specified in the bill, belongs to and is the property of the Portland, Saco, and Portsmouth Railroad Company, and that it is to be divided among those who may be stockholders at the time when its distribution is ordered by said corporation, and a dividend declared; and the trustees will govern themselves accordingly.

CUTTING, KENT, WALTON, BARROWS, and DANFORTH, JJ., concurred.

CORPORATE DIVIDENDS, AND RIGHTS AND REMEDIES OF STOCKHOLDERS WITH RESPECT THERETO. — *Dividend Defined.* — Briefly defined, a dividend is money paid out of profits by a corporation to its share-holders: *Taft v. Hartford etc. R. R. Co.*, 8 R. I. 310, 333; it is understood to be the share or profit coming to each holder of stock: *Commonwealth v. Railroad Co.*, 10 Phila. 465, 466; or a sum which the corporation sets apart from its profits to be divided among its members: *Lockhart v. Van Alstyne*, 31 Mich. 76; *Van Dyck v. McQuade*, 86 N. Y. 38, 47; *Karnes v. Rochester etc. R. R. Co.*, 4 Abb. Pr., N. S., 107. And it is said that the term "dividends" includes, in its technical sense, as well as in its ordinary and common acceptation, all distributions to corporators, whether such distributions are large or small, or whether made at long or short intervals, and without any regard to the manner or place of their declaration or mode of payment: *Clarkson v. Clarkson*, 18 Barb. 646, 657; and see *Osgood v. Laytin*, 3 Abb. App. 418, 423; S. C., 3 Keyes, 521. The word "dividends" *ex vi termini* imports a distribution of the funds of a corporation among its members, pursuant to a vote of the directors or managers: *Williston v. Michigan etc. R. R. Co.*, 13 Allen, 400, 404.

Relation of Stockholder to Dividend. — A stockholder has no claim or right to a dividend until it is regularly declared. Until that time, earnings belong to the corporation, precisely as any other property it may own, and are liable for the corporate indebtedness: *Thompson v. Erie R. R. Co.*, 45 N. Y. 468; *Boardman v. Lake Shore etc. R. R. Co.*, 84 Id. 157; *Hyatt v. Allen*, 56 Id. 553; *Rand v. Hubbell*, 115 Mass. 461; *Chaffee v. Railroad Co.*, 55 Vt. 110; the claims of stockholders are subordinate to the claims of creditors, and the latter approach much nearer the condition of ownership than the former: *Boardman v. Lake Shore etc. R. R. Co.*, 84 N. Y. 157; *Gordon v. Railroad Co.*, 78 Va. 501; *Elkins v. Camden etc. R. R. Co.*, 36 N. J. Eq. 233. But the moment a dividend is declared and credited, it becomes the property of him in whose favor it is declared, and he is entitled to it. It is thenceforth a trust in the hands of the corporation to which the stockholder has acquired vested rights, and to which he is entitled in preference to the creditors of the corporation: *Van Dyck v. McQuade*, 86 N. Y. 38; *Brundage v. Brundage*, 80 Id. 544; S. C., 65 Barb. 397; *Hart v. Railway Co.*, 30 La. Ann. 758; *Har-*

rie v. S. F. Sugar Ref. Co., 41 Cal. 393; *Burroughs v. Railroad Co.*, 67 N. C. 376; *King v. Railroad Co.*, 29 N. J. L. 82, 504; *Jackson v. Plankroad Co.*, 31 Id. 280. A dividend when declared belongs to the holders of the stock at the time of the declaration: *Jermain v. Lake Shore etc. R. R. Co.*, 91 N. Y. 483; *Brundage v. Brundage*, 65 Barb. 397; *Bright v. Lord*, 51 Ind. 272; *Richardson v. Richardson*, 75 Me. 570; *Starrett v. Rockland F. & M. I. Co.*, 65 Id. 382, the last two citing the principal case. The general rule is, that in the absence of any agreement to the contrary, dividends due on stock follow the ownership thereof: *Central R. R. etc. Co. v. Papot*, 59 Ga. 342; and see *Jones v. Railroad Co.*, 57 N. Y. 196; *Gifford v. Thompson*, 115 Mass. 478; *Union Screw Co. v. Am. Screw Co.*, 11 R. I. 569; S. C., 13 Id. 673; *Hyatt v. Allen*, 56 N. Y. 553. The purchaser of stock takes the shares with all their incidents, one of which is the right to receive all future dividends declared on the shares: *March v. Eastern R. R. Co.*, 43 N. H. 515. And dividends are properly payable, as a general rule, to the person in whose name the stock stands registered in the books of the corporation. Until the corporation has been notified of a transfer, it will be protected in paying the dividends to the registered owner, or to his order: *Railroad Co. v. Robbins*, 35 Ohio St. 483; *Brisbane v. Railroad Co.*, 25 Hun, 438; S. C., 94 N. Y. 204.

Dividends to be Made from Net Profits. — It is well settled that dividends can only be paid out of net profits: *Elkins v. Camden etc. R. R. Co.*, 36 N. J. Eq. 233; *Pittsburgh etc. R. R. Co. v. County of Allegheny*, 63 Pa. St. 126; *Hughes v. Vermont Copper Mining Co.*, 72 N. Y. 207; and payment of a dividend out of the capital stock is *ultra vires*, and incapable of ratification by the stockholders: *In re Exchange Banking Co.*, L. R. 21 Ch. 519; and to the same effect, see *Main v. Mills*, 6 Biss. 98; *Lockhart v. Van Alstyne*, 31 Mich. 76; *Bloxam v. Metropolitan R'y Co.*, L. R. 3 Ch. 337. And the "net profits" or "net earnings" from which dividends are to be paid are properly the gross receipts, less the expense of carrying on the business of the corporation to earn such receipts. When all liabilities, including interest on debts, are paid, either out of the gross receipts or out of net earnings, the remainder is the profit of the share-holders, to go towards dividends, which in that way are paid out of the "net earnings": *St. John v. Erie R'y Co.*, 10 Blatchf. 271; S. C., 22 Wall. 136; and see *Belfast etc. R. R. Co. v. Belfast*, 77 Me. 445; *Van Dyck v. McQuade*, 86 N. Y. 47; *Williams v. Western Union Tel. Co.*, 93 Id. 162, 191; *Phillips v. Eastern R. R. Co.*, 138 Mass. 122; *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114, 121; *Union Pacific R. R. Co. v. United States*, 99 U. S. 402; *Warren v. King*, 108 Id. 389. But compare *Corry v. Londonderry etc. R'y Co.*, 29 Beav. 263, holding that "net earnings" are the gross receipts, less the current working expenses, not including interest on money borrowed; and see *People v. Supervisors of Niagara*, 4 Hill, 20.

Discretion of Directors in Declaring Dividends. — As a rule, the directors of a corporation are the sole judges of the propriety of declaring dividends. Whether a dividend shall be made, and if made, how much it shall be, and when and where it shall be payable, rest in the fair and honest discretion of the directors, uncontrollable by the courts: *Luling v. Atlantic Ins. Co.*, 45 Barb. 510; *Jackson v. Newark Plankroad Co.*, 31 N. J. L. 277; *Chaffee v. Rutland R. R. Co.*, 55 Vt. 110; *Williams v. Western U. Tel. Co.*, 93 N. Y. 162; *Coyote etc. M. Co. v. Ruble*, 8 Or. 284; *Brew v. Bank of England*, 2 Barn. & Ald. 620. But the directors may not act illegally, wantonly, or oppressively, and when the right to a dividend is clear, and there are funds from which it can properly be made, a court of equity will compel them to declare and pay the dividend: *Boardman v. Lake Shore etc. R. R. Co.*, 84 N. Y. 167; *Jermain v. Lake Shore etc.*

R. R. Co., 91 N. Y. 483; *Beers v. Bridgeport Spring Co.*, 42 Conn. 17; *Paré v. Grant Locomotive Works*, 40 N. J. Eq. 114; *Belfast etc. R. R. Co. v. Belfast*, 77 Me. 445; *Hameltine v. Belfast etc. R. R. Co.*, 10 Atl. Rep. 328 (Me.); *March v. Eastern R. R. Co.*, 43 N. H. 515. If the directors fail to declare dividends at the stated times, as directed by the charter, it is not in their power to declare a dividend to extend back over the periods during which they had failed to declare dividends: *Gordon v. Railroad Co.*, 78 Va. 501.

Payment of Dividends. — If a dividend be made payable in cash, or payable generally, the corporation becomes a debtor, and must discharge such debt, as it is bound to discharge all its other debts, in lawful currency: *Ehle v. Chittenango Bank*, 24 N. Y. 548; *Williams v. Western Union Telegraph Co.*, 93 Id. 162, 192; *Scott v. Central R. R. etc. Co.*, 52 Barb. 45; and see *Hoole v. Great West. R'y Co.*, L. R. 3 Ch. 262. But in the United States scrip or stock dividends are frequently made, and are sustained by the courts: See *Rand v. Hubbell*, 115 Mass. 461; *Biddle's Appeal*, 99 Pa. St. 278; *Jones v. Morrison*, 31 Minn. 140; *Terry v. Eagle Lock Co.*, 47 Conn. 141; *Gibbons v. Mahon*, 4 Mackey, 130. When stock has been lawfully created, and is held by a corporation, which it has a right to issue for value, then a stock dividend may be made, provided that the stock always represents property: *Williams v. Western Union Tel. Co.*, 93 N. Y. 162; and see *Gordon v. Richmond etc. R. R. Co.*, 78 Va. 501; *Nichols v. Railroad Co.*, 21 Blatchf. 177, 182; *Citizens' etc. Ins. Co. v. Lott*, 45 Ala. 185; *Minot v. Paine*, 99 Mass. 101. A distinction between a cash and a stock dividend is, that the former is created by a simple vote of the directors, while the latter can be initiated only by a vote of the stockholders: *Terry v. Eagle Lock Co.*, 47 Conn. 141, 164.

When the directors undertake to declare a dividend, they are bound to make it equal and just among all the stockholders of the same class. And if they make an unjust discrimination, giving one stockholder an advantage over another, they exceed their powers, and the courts have a right to interpose their authority to prevent it: *Luling v. Atlantic Mut. Ins. Co.*, 45 Barb. 510; *Hale v. Republican River Bridge Co.*, 8 Kan. 466; *Jones v. Terre Haute etc. R. R. Co.*, 57 N. Y. 196; *Jackson v. Newark Plankroad Co.*, 31 N. J. L. 277; *Harrison v. Mexican R'y Co.*, L. R. 19 Eq. 358; and see *Beers v. Bridgeport Spring Co.*, 42 Conn. 17. But the holders of preferred shares constitute a class by themselves, and are entitled to priority over holders of common shares, as it respects dividends: See *Taft v. Hartford etc. R. R. Co.*, 8 R. I. 335; *Belfast etc. R. R. Co. v. City of Belfast*, 77 Me. 445; *Gordon v. Richmond etc. R. R. Co.*, 78 Va. 501; *Emerson v. New York etc. R. R. Co.*, 14 R. I. 555; *Burt v. Rattle*, 31 Ohio St. 116. But dividends on preferred shares can be paid only out of profits actually and *bona fide* earned, and any agreement to the contrary would be opposed to public policy, and void: *Pittsburgh etc. R. R. Co. v. Allegheny County*, 63 Pa. St. 126; *Chaffee v. Rutland etc. R. R. Co.*, 55 Vt. 110; *Painesville etc. R. R. Co. v. King*, 17 Ohio St. 534; *Warren v. King*, 108 U. S. 389. A dividend among preference stockholders exclusively is therefore understood to imply that the sum divided has been realized as profits, though the earnings do not yield a dividend to the stockholders in general: *Lockhart v. Van Alstyne*, 31 Mich. 76, 79; *S. C.*, 18 Am. Rep. 156; *Boardman v. Lake Shore etc. R. R. Co.*, 84 N. Y. 157.

Remedy for Recovery of Dividend. — When a dividend is declared, it becomes a debt due from the corporation to the individual stockholder, and an action at law may be maintained for its recovery: *Philadelphia etc. R. R. Co. v. Conwell*, 28 Pa. St. 329; *West Chester etc. R. R. Co. v. Jackson*, 77 Id. 321; *Jones v. Terre Haute etc. R. R. Co.*, 57 N. Y. 196; *Jackson v. Newark Plank-*

road Co., 31 N. J. L. 277; *King v. Railroad Co.*, 29 Id. 504; but a demand of payment is necessary before suit brought: Id.; *Scott v. Central Railroad*, 52 Barb. 45; *Hagar v. Union Nat. Bank*, 63 Me. 509. Compare *Robinson v. Nat. Bank of New Berns*, 95 N. Y. 637. And interest will not accrue upon dividends, nor will the statute of limitations begin to run, until demand is made: *State v. Baltimore etc. R. R. Co.*, 6 Gill, 363; *Philadelphia etc. R. R. Co. v. Cowell*, 28 Pa. St. 329. If, however, the holder of preferred stock is compelled to bring an action to enforce the declaration of dividends by reason of the failure of the corporation to declare a dividend when they had funds for that purpose, he may recover the dividend, with interest thereon. Under such circumstances, the corporation cannot claim to be exempted from the payment of interest as damages, in consequence of the failure to perform a plain obligation: *Boardman v. Lake Shore etc. R. R. Co.*, 84 N. Y. 157; and see *Prossy v. Michigan etc. R. R. Co.*, 1 Hun, 655; *Manning v. Quick-silver Mining Co.*, 24 Id. 360.

Application of Dividends to Debt of Share-holder. — A cash dividend due a share-holder may be retained by the corporation, and applied in liquidation of a debt due it from the share-holder: *Sargent v. Franklin Ins. Co.*, 8 Pick. 90; *Hagar v. Union National Bank*, 63 Me. 509. It may, like any other debt, be set up by way of set-off or counterclaim against the debt of the share-holder to the corporation: Id.; *Bates v. New York Ins. Co.*, 3 Johns. Cas. 238; and by banking corporations it may sometimes be carried to the general account of the stockholder with the corporation, and thus applied in adjusting balances between the parties, or in satisfying the claims of the corporation against the stockholder: *King v. Paterson etc. R. R. Co.*, 29 N. J. L. 504, 506. Compare *Merchants' Bank v. Shouse*, 102 Pa. St. 488.

Recovery Back of Dividends Improperly Declared and Paid. — It is well-settled doctrine in this country that the capital stock and property of every corporation constitute a trust fund for the benefit of the general creditors of the corporation, and such creditors have a lien and the right to priority of payment over any stockholder: *Wood v. Dummer*, 3 Mason, 308; *Burke v. Smith*, 16 Wall. 390; *Sawyer v. Hoag*, 17 Id. 610; *County of Morgan v. Allen*, 103 U. S. 498; *Bunn's Appeal*, 105 Pa. St. 49; *Crawford v. Rohrer*, 59 Md. 599; *Bassett v. St. Albans Hotel Co.*, 47 Vt. 313; *Hastings v. Drew*, 76 N. Y. 9; *Bartlett v. Drew*, 57 Id. 587; *Mills v. Stewart*, 41 Id. 389. Hence, if the capital stock be diverted in whole or in part to the payment of dividends, the corporate creditors may follow it into the hands of the stockholders and recover it back. The stockholders are affected with notice of the trust character of the capital stock, and cannot claim to occupy the status of bona fide holders: *Peterson v. Illinois Land and Loan Co.*, 6 Ill. App. 257; *Curran v. State*, 15 How. 304; *Lexington Life etc. Ins. Co. v. Page*, 17 B. Mon. 412; 8 O., 66 Am. Dec. 165; *Hastings v. Drew*, 76 N. Y. 9; *National Trust Co. v. Miller*, 33 N. J. Eq. 155; *Clapp v. Peterson*, 104 Ill. 26; *Heman v. Britton*, 86 Mo. 549. And a single judgment creditor, after the return of an execution against the corporation unsatisfied, may maintain an action, in the nature of a creditor's bill, against the stockholders to recover back whatever was received by them as dividends out of the capital stock: *Hastings v. Drew*, 76 N. Y. 9; *Bartlett v. Drew*, 57 Id. 587; and see *McLean v. Eastman*, 21 Hun, 312; *Williams v. Boice*, 33 N. J. Eq. 364; *Brewer v. Michigan Salt Assoc.*, 58 Mich. 351; *Sturges v. Vanderbilt*, 73 N. Y. 384; but the creditor is not required to bring his suit on behalf of other creditors who may choose to come in, but may sue alone for his own exclusive benefit: *Bartlett v. Drew*, 57 Id. 587. This action cannot, however, be maintained without a valid judgment and execution against the corpora-

tion or its successors, or without first exhausting the creditor's remedies against the property remaining in the hands of the corporation, or received by its trustees upon its dissolution: *Sturges v. Vanderbilt*, 73 Id. 384.

Right to Dividends, as between Life Tenant and Remainderman.—Cash dividends are regarded as income, and all cash dividends declared during the existence of the life estate go to the tenant for life: *Lord v. Brooks*, 52 N. H. 72, 79; *Richardson v. Richardson*, 75 Me. 570; S. C., 46 Am. Rep. 428; *Goldsmith v. Swift*, 25 Hun, 201; *De Gendre v. Kent*, L. R. 4 Eq. 283; *In re Barton's Trust*, L. R. 5 Eq. 238; *Bates v. Mackinley*, 31 Beav. 280. But in respect to the right to stock dividends, as between tenant for life and remainderman, the decisions are conflicting. In many of the states, stock dividends created by and declared from the surplus earnings of a corporation are, as between a tenant for life and those interested in the remainder, treated as income, and not as an addition to the capital, and are regarded as belonging to the tenant for life: See *Earp's Appeal*, 28 Pa. St. 368; *Willbank's Appeal*, 64 Id. 256; S. C., 3 Am. Rep. 585; *Vinton's Appeal*, 99 Id. 434; S. C., 44 Am. Rep. 116; *Biddle's Appeal*, 99 Id. 278; *Richardson v. Richardson*, 75 Me. 570; S. C., 46 Am. Rep. 428; *Lord v. Brooks*, 52 N. H. 72; *Ashurst v. Field*, 28 N. J. Eq. 1; *Simpson v. Moore*, 30 Barb. 637; *Scovil v. Roosevelt*, 5 Redf. 121; *Goldsmith v. Swift*, 25 Hun, 201; *Riggs v. Cragg*, 26 Id. 89; S. C., reversed on another point, 89 N. Y. 479. In Massachusetts the simple rule is to regard cash dividends, however large, as income, and stock dividends, however made, as capital. Cash dividends go to the tenant for life, and stock dividends to the corpus: *Minot v. Paine*, 99 Mass. 101; S. C., 96 Am. Dec. 705; and see *Hemenway v. Hemenway*, 134 Mass. 446; *Rand v. Hubbell*, 115 Id. 461; S. C., 15 Am. Rep. 121; *New England Trust Co. v. Eaton*, 140 Mass. 532. Such is also the Georgia rule, under the code of that state: See *Millen v. Guerrand*, 67 Ga. 284; S. C., 44 Am. Rep. 720. Compare *Gibbons v. Mahon*, 4 Mackey, 130; S. C., 54 Am. Rep. 262. Under the English rule, as now settled, "regular" dividends, although increased in amount, belong to the tenant for life. But "extraordinary" or unusual dividends, whether declared in cash or stock, go to augment the capital, and belong to the remainderman: See *Brander v. Brander*, 4 Ves. 800; *Paris v. Paris*, 10 Id. 185; *Hooper v. Rosseter*, 1 McClell. 527; *Bates v. Mackinley*, 31 Beav. 280; *In re Barton's Trust*, L. R. 5 Eq. 238; *Straker v. Wilson*, L. R. 6 Ch. 503. The English rule is followed by the supreme court of Rhode Island, in *Petition of Brown*, 14 R. I. 371; S. C., 51 Am. Rep. 397.

KNIGHT v. DYER.

[57 MAINE, 174.]

TWO DEEDS EXECUTED AND DELIVERED ON SAME DAY BY SAME GRANTOR to different grantees, one conveying one parcel of land with an easement in another, and the other deed conveying the latter parcel, but reserving the easement, are to be construed together.

RIGHT TO EASEMENT IN LAND IS ACQUIRED BY DEED OF CONFIRMATION from the owner of the land, in which he confirms, acknowledges, and grants the easement therein, to be used by the grantee, his heirs and assigns, without denial, obstruction, or hindrance.

THOUGH DEED OF LAND WITH UNRECORDED BOND TO RECONVEY CONSTITUTES MORTGAGE only as between the parties, as to the public without notice it conveys the fee; and if the holder of the record title under it conveys an easement in the land, even without consideration, and the person to whom such conveyance is made conveys to a third person for a valuable consideration, neither grantee having any knowledge of the bond to reconvey, the latter grantee will acquire such title as the record gives him.

CASE for the obstruction of a way. The opinion states the facts.

Davis and Drummond, for the plaintiff.

J. D. and F. Fessenden, for the defendant.

By Court, APPLETON, C. J. In 1840, William Trundy, the elder, owned both the plaintiff's and defendant's farms. The plaintiff's farm was on the highway. The defendant's on the seashore. Other farms were between these two, over which there was a road leading from one to the other and over the lower farm to the seashore. There were three coves on the defendant's farm, named Carty's cove, Fore cove, and Back cove.

On the 11th of June, 1840, William Trundy, Sen., conveyed the plaintiff's farm to his son William, and with it "the privilege at all times of taking from the cove at my lower place, called Carty's cove, sea-dressing, such as may be brought into said cove from time to time by the sea, together with the privilege of passing and repassing with teams and carts, or otherwise, to and from said cove on the road through said land, as it is now traveled."

On the same day, Trundy, Sen., conveyed to his son John the lower farm, "beginning at the northeast corner of John Johnson's land; thence by said land to the sea at a cove called Carty's cove; thence by the sea to John Peable's land; thence by said Peable's land to the first-mentioned bounds, containing twenty-two acres, more or less, — expressly reserving a privilege at all times of passing with teams or carts, or otherwise, to and from said cove, and taking therefrom such sea-dressing as may from time to time be brought into said cove by the seas, which privilege has already been conveyed by me to my son William."

These deeds were executed and delivered at the same time. They are to be construed together. The "said cove" in the deed to John Trundy refers to Carty's cove. It can refer to no other. The deed to William Trundy expressly refers to

Carty's cove. We think the fair and obvious construction of both deeds leads to the unavoidable conclusion that the right to take sea-weed was reserved in Carty's cove.

But it seems that Fore cove was sometimes called Carty's cove, and the plaintiff's grantor claimed the right to take sea-weed in that cove.

A dispute having thus arisen, Rufus Jordan, 2d, having the title to the farm deeded to John Trundy, gave, on the 3d of December, 1854, a deed to Reuben Keazer, who then owned the William Trundy, Jr., farm, on the following terms: "Whereas, John Trundy, of Cape Elizabeth, in the county of Cumberland, conveyed to one Rufus Jordan, 2d, a tract of land in said Cape Elizabeth, lying on the seashore, and including a cove on the easterly side of said lot, to which a road has for many years led across said land, and traveled for the purpose of getting dressing, among other things, which flows in from the sea; and whereas, Reuben Keazer, of said Cape Elizabeth, owns a parcel of land near the above, which heretofore had the privilege connected with it for the owner to pass over the road aforesaid for the purpose of getting dressing,—

"Now I, the said Rufus Jordan, 2d, for the purpose of removing all doubt in regard to the right of said Keazer to use the road aforesaid, do hereby ratify, confirm, and acknowledge, and grant unto the said Keazer, his heirs and assigns, in common with myself, my heirs and assigns, and no other persons, the sole right and privilege to pass and repass for himself, his servants and teams, over the road traveled as aforesaid across my said land, for the purpose of taking and removing from said cove, to which said road leads, the dressing which may flow into the same from the sea, without denial, obstruction, or hindrance," etc.

This gives the right to take sea-weed from the cove, and to pass over the road obstructed by the defendant. It grants the right to pass and repass without denial, obstruction, or hindrance.

It is argued that this is simply a deed of confirmation, and that it could only confirm what had been previously granted, but that it could not enlarge the rights of the grantee. But Lord Coke says: "A confirmation is a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or where a particular estate is increased."

But here is not merely a confirmation, but there is a grant and a right to pass and repass over a designated road "with-

out denial, obstruction, or hindrance." "And here is to be observed," says Lord Coke, "that some words are large and have a generall extent, and some have a proper and particular application. The former sort may contain the latter; as *dedi* or *concessi* may amount to a grant, a payment, a gift, a release, a confirmation, a surrender, etc., and it is the election to use to which of these purposes he will": Co. Lit. 801 b.

But it is said that Jordan, at the date of the deed, was only mortgagee, and that the mortgage was paid at the maturity of the note, to secure which it was given.

Although Jordan had, at the date of the deed to Keazer, the record title to the John Trundy farm, it seems that he had given a bond of even date with the deed of Trundy to him to reconvey the premises to him upon repayment of the amount loaned at maturity. It does not appear that the bond was recorded. It does not appear that the deed to Jordan was recorded. The amount due was seasonably paid, and there was no forfeiture of the bond. But the deed from Jordan to Keazer was executed and recorded before the payment and before the release from Jordan to Trundy. As between Trundy and Jordan, this transaction constituted a mortgage. As to the public, so far as was disclosed by the record, Jordan had an estate in fee.

Both Keazer and the plaintiff testify that they were ignorant of any right of John Trundy to redeem. The plaintiff, then, is to be regarded as a *bona fide* purchaser, and is entitled to hold such title as the record gives him.

On the 3d of April, 1856, Reuben Keazer conveyed to the plaintiff the William Trundy farm, using the following words in relation to the right to pass and repass for the purpose of obtaining sea-weed: "Also the privilege of taking, at all times, from the cove where the road leads to the sea across said Trundy's farm, sea-dressing, such as may be brought into said cove from time to time by the seas, together with the privilege of passing and repassing with teams or carts, or otherwise, to and from said cove into the road as it is now traveled across the Trundy farm, — meaning and intending to convey all the premises, rights, and privileges which are conveyed to me by William Trundy's deed, dated October 6, 1861, recorded in the Cumberland registry-book, 232, p. 541, to which, for any further particulars, reference is hereby made. By the privilege above conveyed, I intend only to convey what

was confirmed to me by deed from Rufus Jordan, 2d, dated December 3, 1854."

By this deed, the plaintiff acquired the right to pass over the road obstructed by the defendant. It matters not that Keazer paid nothing for the deed of Jordan to him. The plaintiff is entitled to hold what the record gives him. His grantor acquired from Jordan, while the fee as of record was in him, the right to pass and repass. That right he conveyed to the plaintiff, and the defendant has prevented his exercising it.

Judgment for the plaintiff.

CUTTING, DICKERSON, BARROWS, DANFORTH, and TAPLEY, JJ., concurred.

HOOPER v. HOBSON.

[57 MAINE, 273.]

RIGHT OF PUBLIC IN NAVIGABLE OR FLOATABLE STREAM IS LIMITED, in general, by its banks, which are the boundaries within which the common right must be confined.

LOG-OWNERS ARE LIABLE TO RIPARIAN PROPRIETOR FOR DAMAGES done by them in traveling upon the banks of a floatable stream for the purpose of driving their logs.

TRESPASS for entering the plaintiff's close, trampling down the grass, and breaking down and injuring the banks of a stream running through said close. It appeared that the defendant, in the spring of 1868, turned into and drove down a stream called Swan Pond Brook, running through plaintiff's land, about a million feet of logs. The stream was from six to sixteen feet wide, and from two to six feet deep. The defendant had thirty men at work driving the logs, which they propelled by walking on the banks. They frequently rolled in logs from the banks, and in doing so punched holes in the banks with hand-spikes. The case was reported to the whole court.

Wedgwood and Stone, for the plaintiff.

Chisholm, for the defendant.

By Court, BARROWS, J. It is not necessary to the proper determination of this case to settle the question whether Swan Pond Brook, where it flows through the plaintiff's farm, is a public highway. Perhaps it might not be difficult to do so,

by carefully applying to the testimony here presented the legal principles laid down in *Wadsworth v. Smith*, 12 Me. 278; *Brown v. Chadbourne*, 31 Id. 9 [50 Am. Dec. 641]; and *Treat v. Lord*, 42 Id. 552 [66 Am. Dec. 298]; but there is no occasion for it here and now. If it be conceded that this brook is a highway by water, in which the defendant may have a right in common with the rest of the public, still the defense is not maintained; for according to his own showing, and the testimony of his employees, the defendant went *extra viam*, and injured the plaintiff's grass-land, through which the brook runs, by trampling it and disturbing the soil more or less during some five or six weeks in the spring of the year, and along the whole course of the stream.

The right of the public in a stream, capable of being used for floating logs or as a passage-way for boats or barges of sufficient capacity to be useful in commerce or agriculture, is not thus to be extended over adjoining lands. The water makes and defines the highway. The facilities for transportation afforded by it are privileges which, like those of air and light, are too great to be suffered to become the subjects of private property. But the exercise of the common privilege must not be made an occasion for encroachment upon that which is legitimately the exclusive property of another. The right which the public enjoy in a navigable or floatable stream is, in general, limited by its banks. The proper definition of the word "bank," in this connection, is, "a steep acclivity on the side of a lake, river, or the sea." These banks are the boundaries within which the exercise of the common right must be confined. Except during the continuance of an overflow, or in the exercise of those privileges which are given and defined by statute, log-owners and river-drivers have no rights in a floatable stream, beyond these boundaries. Important as their business undoubtedly has been and is, it must be conducted with a due regard to the rights of others. Their liability to pay damages to the riparian proprietor for traveling upon the banks to propel their logs is expressly recognized in *Brown v. Chadbourne*, *supra*, relied upon by the defendant here: See the opinion in that case in 31 Me. 24 et seq.

The *dictum* in the same case, that "the banks of the stream may be used for driving logs," is based upon the statute privileges already alluded to, and is to be construed with reference to the statute creating them. With regard to the use of the banks of navigable rivers, or such streams as are, from their

inherent capacity, properly recognized as public highways, there is an essential difference between the doctrines of the common law and those of the civil law. Under the latter, the public have the same right to use the banks as they have to use the river itself: *Vide* Cooper's Justinian, lib. 2, tit. 1, De usu et proprietate riparum. Not so under the common law: *Ball v. Herbert*, 3 Term Rep. 253.

It is not, however, to be inferred that every casual landing upon the bank by those employed in driving a floatable stream would be the ground of an action by the proprietor of the land. The privilege of going upon adjoining lands, to remove timber lodged thereon, after tender of compensation for damages, which is conferred by chapter 42, section 8, revised statutes of 1857, would seem to imply that, where no actual damage is inflicted in so doing, no action would lie; and that, we think, is the true extent and meaning of the *dictum* in *Brown v. Chadbourne*, above referred to, which the defendant here seeks to expand into a justification for driving this stream in a manner more convenient and economical for himself, perhaps, than any other which could have been adopted, but manifestly prejudicial to the interests of the owner of the soil. The log-owner who seeks privileges of this description can obtain them only by contract with the riparian proprietor.

It is hardly supposable that anything that could properly be termed the bank of a stream like Swan Pond Brook would afford a foothold for travelers; and in order to include the ground traversed by the defendant's employees, the signification of the word "bank" must be extended as indefinitely as the defendant claims to extend the public easement. The defendant's employees seem to have traveled on the plaintiff's land, adjoining the brook, because, as one or two of his witnesses declare, "It was more convenient to go on the banks,"—"a saving of time and money."

No question arises, in this case, as to any right of using the banks of a stream which may be acquired by long and constant usage. No such usage is shown to have existed there.

The defendant, after paying one year for similar use of the plaintiff's land, and telling the plaintiff to get the damages for which this suit is brought appraised, now claims that that use is a right, incident to the enjoyment of a public highway in the course of the stream. The claim cannot be allowed.

Judgment for plaintiff for twenty-five dollars damages.

APPLETON, C. J., and DICKERSON, DANFORTH, and TAPLEY, JJ., concurred.

RIGHT OF RIPARIAN OWNER TO BANKS OF RIVER: See *Ensminger v. People*, 95 Am. Dec. 495, note 501; *Bainbridge v. Sherlock*, 95 Id. 644, note 653, where other cases are collected; *Lancey v. Clifford*, 92 Id. 561, note 564.

HINES v. ROBINSON.

[57 MAINE, 324.]

ONE TENANT IN COMMON MAY MAINTAIN ACTION AGAINST HIS CO-TENANT for an injury to the common property.

WHERE DEED REFERS TO DESCRIPTION IN ANOTHER DEED, and such reference is free from ambiguity, and contains nothing inconsistent with whatever of specific description is contained in it, such deed must be construed to convey all the estate described in the deed to which such reference is made, and parol evidence cannot be admitted to show the intention of the parties, and to limit its extent by construction in a way which would violate any of its calls.

GRANTOR WHO HAS CONVEYED GOOD TITLE BY WARRANTY DEED MAY NEVERTHELESS SET UP AGAINST HIS GRANTEE, or against those who hold his grantee's title, a title subsequently acquired by himself by disseisin of his original grantee, and those claiming under him.

OPEN AND EXCLUSIVE POSSESSION OF GRIST-MILL, AND GRIST-MILL PRIVILEGE, for upwards of twenty-two years confers upon the possessor a good title thereto, even against one to whom he had conveyed the same prior to his taking such possession.

BUILDING BY TENANT IN COMMON OF EXCELSIOR-MILL SO NEAR TO GRIST-MILL owned by him and his co-tenant as to darken the grist-mill, and prevent access to its underworks for the purpose of repairing them, and the use of the yard in front of it as a place for the piling of lumber in such a manner as to exclude customers from the grist-mill, constitute such an injury to the common property as will give the co-tenant a right of action.

TENANT IN COMMON MAY MAINTAIN ACTION AGAINST HIS CO-TENANT and a stranger for using water for another mill, which rightfully belongs to a mill that is the common property of such co-tenants.

CONSTRUCTION OF GRANT OF WATER-POWER THAT WILL RESTRICT GRANTEE to the specific use to which the water was applied when the grant was made will never be adopted, unless the language of the grant unmistakably shows that such was the intention of the parties.

CASE. The opinion states the facts.

E. G. Harlow and G. D. Bisbee, for the plaintiff.

W. W. Virgin, for the defendants.

By Court, BARROWS, J. Action on the case. The plaintiff alleges in his writ that he is the owner of an undivided half

of a grist-mill and privilege, and all the appurtenances thereto belonging, including the right to raise a head of water necessary for the same by means of the upper dam on the outlet of Buggernut Pond, and the right to "all the water in said pond, except so much as shall be actually needed and used by a certain saw-mill there situated; and the exclusive right to all the water in said pond when the water is no more than four feet and six inches high in the flume of the said upper dam"; that Nathaniel W. Corliss, one of the defendants, is the owner of the other undivided half of said grist-mill, its privileges and appurtenances, and also with the other defendant, Robinson, owns the saw-mill above referred to; that Robinson and Corliss have erected a building on the privilege, so placed and constructed as to darken the grist-mill and obstruct its use, and prevent repairs, reconstruction, or enlargement of it, and have placed in this new building certain excelsior machines and a shingle machine, which they run in addition to their saw-mill, using the water so as to infringe the exclusive right of the grist-mill above asserted, and to prevent any profitable use of the grist-mill. The erection of a building in close proximity to the grist-mill, and the use of the water when there was less than four feet and a half in the flume, for the purpose of running the additional machinery, are admitted by the defendants.

They deny the plaintiff's title, and claim the right to do what they have done without subjecting themselves to an action.

If the plaintiff can maintain a suit against any person for doing these acts, the fact that one of these defendants is his co-tenant in the property injured will not bar the action: *Blanchard v. Baker*, 8 Me. 253 [23 Am. Dec. 504]. See also *Maddox v. Goddard*, 15 Id. 218 [33 Am. Dec. 604], where Shepley, J., remarks as follows: "One general principle may be clearly discovered in all these authorities, that when a tenant in common does an unlawful act whereby his co-tenant is injured, the law affords the appropriate remedy arising out of the nature of the property or estate and the character of the wrongful act."

The appropriate remedy for such an injury as the plaintiff here alleges is an action of trespass on the case.

Indeed, the defendants' counsel do not appear seriously to rely upon the fact of the co-tenancy in defense; but claim that, upon a correct construction of the deeds which make

part of the case, and upon such other evidence as is legally admissible, the plaintiff shows no title.

On the 23d of July, 1835, Winslow Hall owned the whole privilege, and conveyed to Ira Bartlett an undivided half of it, describing it as "being the mill privilege, so called, situated near said Hall's dwelling-house, and the same on which said Hall's saw-mill now stands, being a part of lot No. 9, in the fifth range of lots in Hartford, and bounded as follows, viz., beginning," etc.; also, "one half the right to flow the other lands belonging to said Hall, lying above said privilege, to any extent necessary for the use of the mill on the privilege now standing, or any other that may be built thereon," with sundry other rights not material to the proper understanding of the questions here raised. Hall conveyed the other undivided half of the same property, with like rights, to Ephraim B. Gammon, on August 13, 1835. It appears that Ira Bartlett and Gammon built a grist-mill on the privilege, and Gammon conveyed to the plaintiff, March 30, 1841, by deed duly recorded the next day, "one undivided half of a saw-mill and grist-mill situated in said Hartford, and one undivided half of the mill privilege on which the said mills stand, being part of lot No. 9, in the fifth range of lots in said Hartford, containing what was deeded to me by Winslow Hall, of said Hartford, by deed dated August 30, 1835, except a piece sold to Samuel Alley, Jr., and occupied by him with a tan-yard and shop and bark-house."

On the 17th of May, 1843, the plaintiff conveyed to Horace Bartlett "one undivided half of a saw-mill situated in said Hartford, and one undivided half of the saw-mill privilege on which the said saw-mill stands, being part of lot numbered 9, in the fifth range of lots in said Hartford, containing what was deeded to me by Ephraim B. Gammon, of said Hartford, by his deed dated March 30, 1841. For a more full description, see Winslow Hall's deed to the said Gammon, dated August 30, A. D. 1835, to which deed reference is hereby made."

We find no rule of construction under which this deed can be held to convey anything less than the whole estate which Hines acquired, through E. B. Gammon, from Winslow Hall, to whose deed to Gammon reference is made. There is nothing in that reference which creates any ambiguity, — nothing inconsistent with whatever there is of specific description in this deed. It comports fully throughout with a design to con-

vey all the property described in the deed to which reference is made; and where the language of a conveyance is intelligible and consistent, we cannot let in parol evidence to show the intention of the parties, and to limit its extent by construction in a way which would violate any of its calls.

Their intention must be ascertained from the writing itself, which, in such cases, is the best and only legal evidence of it. A deed which, through the ignorance or heedlessness of the scrivener, misrepresents the bargain between the parties, may doubtless be reformed in equity; but until that is done, it must be allowed to have, in a suit at law, all its legitimate effect according to its terms.

But it does not follow that the plaintiff has not now a good title to the part of the grist-mill and its privilege, of which he has been so long in possession.

It remains to be determined from the testimony whether the plaintiff has not, since the making of his deed to Horace Bartlett on the 17th of May, 1843, acquired a good title, by disseisin and adverse possession, to the premises which he claims, as against his grantee and the defendants who derive their title from him.

That there is no legal rule or principle which will preclude the plaintiff from asserting a title thus acquired against his grantee, and those claiming under him, was settled in a thoroughly satisfactory opinion in the case of *Stearns v. Hendersass*, 9 Cush. 497 [57 Am. Dec. 65]. It is unnecessary here to rehearse the reasons for the doctrine. They are clearly and forcibly set forth in the case referred to. Suffice it to say that we hold that a grantor who has conveyed a good title by warranty deed may nevertheless set up against his grantee, or against those who hold his grantee's title, a title subsequently acquired by himself by disseisin of his original grantee, and those claiming under him; that he does not thereby impeach or overthrow his own conveyance; that no principle of estoppel or rebutter prevents him from asserting a title thus subsequently acquired; and that such title, when maintained by the proper evidence, will stand him in as good stead as an undisputed reconveyance from his grantee. Has the plaintiff here such a title?

It is admitted by the defendants that Horace Bartlett, after his purchase from the plaintiff on the 17th of May, 1843, actually took possession of one half of the saw-mill, and the saw-mill privilege only. The plaintiff testifies (and there is

nothing in the case to discredit or control his testimony) that he has kept possession of his half of the grist-mill, hitherto taking the profits accruing therefrom; that he, and those jointly interested with him, have always had the open and exclusive possession of the grist-mill and grist-mill privilege, claiming to own it, alternating in the use of it with each other monthly up to November, 1865, when the wheel broke; no one ever denying his right, or asserting any counterclaim, until some time in the summer of 1865, when these defendants erected the building and put in the machinery here complained of, and began to use the water without regard to the alleged rights of the grist-mill proprietors, and to deny the plaintiff's interest in the premises.

In 1855, the plaintiff, alleging himself to be the owner of an undivided half of the grist-mill and grist-mill privilege, petitioned the county commissioners for an assessment of the damages caused thereto by the location of the Buckfield Branch Railroad. Harvey Bartlett, then owning half the saw-mill, by conveyance from Horace, the plaintiff's grantee, petitioned in like manner for the damages done to the saw-mill; and it appears that the hearing before the commissioners on these two petitions was had on the same day, and that an award of some eight hundred dollars was made to the plaintiff as the owner of the grist-mill. In fine, he seems to have been in full and undisputed possession of the half of the grist-mill and the grist-mill privilege, claiming it as owner, and being recognized as such, not only by his co-tenants in that property, but by the successive proprietors of the saw-mill up to the time of the commencement of the defendants' encroachments in 1865, — that is, for something over twenty-two years subsequent to his conveyance to Horace Bartlett. That possession must have been perfectly well known to all the proprietors of the saw-mill who are the defendants' grantors; and it must be considered as proved that the plaintiff has had such a possession of one half of the grist-mill since his conveyance to Horace Bartlett as gives him a perfect title thereto, although it was included in that conveyance. The defendant Corliss, as grantee of Rufus Woodsum, owns the other half; but that fact, as we have seen, will not protect him in a suit by his co-tenant for an injury to the common property.

The building of the excelsior-mill in such a manner as to darken the grist-mill and prevent access to it for the purpose

of repairing the wheels and underworks, and the use of the land in front of it as a piling-place for lumber, to the exclusion of customers from the grist-mill, constitute such an injury.

With regard to the use of the water, the undisputed testimony is, that prior to 1865 the owners of the saw-mill were careful to leave water enough for the use of the grist-mill at all seasons; that the water in the upper flume did not ordinarily fall to a depth of less than four and a half feet before August or September; and that that depth of water in the upper flume would keep the grist-mill alone supplied for a month. When Ira Bartlett conveyed his half of the saw-mill and its privileges now owned by the defendants, he excepted and reserved in the conveyance all the water in the pond when it is below four and a half feet in the flume at the upper dam, except from the 1st of March to the 1st of May in each year; and simultaneously with the conveyance, Harvey Bartlett, to whom it was made, gave his bond to the plaintiff and Rufus Woodsum (who were then in possession of the grist-mill) with penalty, reciting his obligation, "not to use or cause to be used any water in the mill-pond for running his saw-mill from the first day of May to the first day of March following, in each and every year, unless the water in the upper flume is more than four and a half feet deep." Taking this in connection with the testimony previously adverted to in regard to the use of the water prior to 1865, it must be considered as establishing the right of the proprietors of the grist-mill to the exclusive use of the water if it falls below four and a half feet in depth in the upper flume, between the 1st of May and the 1st of the succeeding March.

This right, also, the defendants have infringed, and are responsible for the damage thereby occasioned.

Among the questions stated in the report, we find the following:—

"Have defendants a right to use water for any other purpose than for a saw-mill?"

This must depend, in the present case, upon the terms of the deeds under which they hold. A construction which would restrict the grantees to the specific use to which the water was first applied is not to be favored, for reasons which are well assigned in *Tourtellot v. Phelps*, 4 Gray, 370, and *Ashley v. Pease*, 18 Pick. 268; and it will never be adopted unless the language of the grants unmistakably indicates that it was the intention of the parties so to restrict the use of the water. Upon an ex-

amination of the conveyance here, we see nothing to base such a restriction upon, nothing to take the case out of the general rule, which is stated by Shaw, C. J., in the case last referred to, as follows:—

“In general, where a mill seat is granted,—that is, land on a stream on which mills are actually situated, or where it appears by the grant that the object is to erect mills thereon,—the soil is the principal subject of the grant; the right to use it for any and all mill purposes at the pleasure of the owners, and to change those uses at pleasure, follows as incident to the ownership; and words of description of the water-power, such as the right to use the stream for the saw-mills, and grist-mills, etc., situated, etc., are not to be considered as restrictive of the more general right incident to the ownership.

We hold, then, that the defendants may rightfully use the water for other purposes than for a saw-mill, provided only that they do not by the new use interfere with the rights which the proprietors of the grist-mill have gained by long-continued, uninterrupted user, and the compacts of the previous proprietors.

But they can in no event, and for no purpose, draw the water so as to reduce the depth in the upper flume below four and a half feet, between the first day of May and the 1st of March following, as the case finds they have done, without subjecting themselves to a liability to pay all damages to the proprietors of the grist-mill. We think Harvey Bartlett's bond must be taken to be declaratory of the mutual rights of the proprietors of the saw-mill and grist-mill respectively, as previously established among themselves, and confirmed by long-continued use.

Some other questions are proposed in the report, but the evidence relating to them is too scanty and vague to enable us to give answers sufficiently definite to subserve any useful purpose.

If the referee to whom the case is to go for the assessment of damages has any doubt with regard to them, it will be competent for him to present them to the court by his report, accompanied by such a statement of the facts which he finds established, as may be necessary for their determination.

Defendants defaulted.

APPLETON, C. J., and WALTON and DANFORTH, JJ., concurred.

KENT and TAPLEY, JJ., concurred in the result.

ADVERSE POSSESSION FOR PERIOD PRESCRIBED GIVES PERFECT TITLE: See *Cannon v. Stockmon*, 95 Am. Dec. 206, note 209, where other cases are collected.

POSSESSION OF GRANTOR IS NOT ADVERSE TO TITLE OF HIS GRANTEE: See *Rowe v. Beckett*, 95 Am. Dec. 676, note 684, where other cases are collected.

ACTIONS BETWEEN CO-TENANTS: See *Hamilton v. Conine*, 92 Am. Dec. 724, note 730; *Crane v. Waggoner*, 89 Id. 493, note 494, where other cases are collected.

DESCRIPTION IN DEED BY REFERENCE TO ANOTHER INSTRUMENT: See *Caldwell v. Center*, 89 Am. Dec. 131, note 134; *Newman v. Tymeson*, 80 Id. 735, note 738, where other cases are collected.

FIELD v. TIBBETTS.

[87 MAINE, 358.]

NEGOTIABLE NOTE PAYABLE BY INSTALLMENTS IS DISHONORED WHEN FIRST INSTALLMENT IS OVERDUE and unpaid.

DEFENSE THAT NEGOTIABLE NOTE WAS GIVEN IN PART FOR INTOXICATING LIQUORS cannot be set up against any holder for a valuable consideration, and without notice of the illegality of the contract, notwithstanding it was past due when he took it.

UNDER MAINE STATUTE, FACT THAT NOTE IS OVERDUE IS NOT NOTICE, either express or implied, that it was given for intoxicating liquors.

WRIT of entry on a mortgage dated October 24, 1866, given by the defendant to one Coffee, to secure the payment of a note in monthly payments. The plaintiff read the mortgage and an assignment thereof to himself, dated December 24, 1866, and also the note, which was duly indorsed to him at the same time that the assignment was made. The defendant offered to prove that the note was given in part for intoxicating liquors unlawfully sold. This evidence was excluded by the court on the objection of the plaintiff. The defendant thereupon submitted to a default, which was to be taken off, and the case stand for trial, if the ruling was erroneous.

Titcomb, for the plaintiff.

J. Baker, for the defendant.

By Court, WALTON, J. We think the note must be regarded as dishonored at the time it was indorsed to the plaintiff, *Vinton v. King*, 4 Allen, 562, and was therefore subject to the defense of a want or failure of consideration. But we do not think the fact that it was then overdue subjected it to the defense that it was given in part for intoxicating liquors. The effect of our statute is, that such a defense shall not extend to

negotiable paper in the hands of any holder for a valuable consideration, and without notice of the illegality of the contract. This protection is not limited to such holders as take the paper before it is due; it is extended in terms to "any holder for a valuable consideration, and without notice of the illegality": Act of 1858, c. 33, sec. 27. In the trial of such an issue, the fact that the paper was or was not overdue when the plaintiff took it seems to be immaterial. The question is not whether the paper was or was not overdue, but whether the plaintiff is a holder for value, and without notice of the illegality of the contract. If he prevails upon these points, he brings himself within the terms of the statute, and is entitled to its protection. Such a defense must be governed by our statute, and not by the rules of the mercantile law. By the common law, the fact that the note was given for intoxicating liquors would be no defense. Such a defense, as well as its limitations, is created and regulated by our statute, and not by the mercantile law. Under our statute, the fact that a note is overdue is not notice, express or implied, that it was given for intoxicating liquors.

Case to stand for trial.

CUTTING, KENT, DICKERSON, and BARROWS, JJ., concurred.

ON NOTE PAYABLE BY INSTALLMENTS, ACTION MAY BE BROUGHT when one of the installments becomes due: See *Coples v. Braman*, 64 Am. Dec. 183.

WARE v. HEWEY.

[57 MAINE, 321.]

LOAN OF MONEY "TO BE PAID WHEN CALLED FOR," IS DUE when the loan is made, and the statute of limitations begins to run from that time.

ASSUMPSIT. The writ was dated July 26, 1868. The plaintiff introduced evidence tending to show that, on July 20, 1862, he loaned the money sued for to the defendant, who agreed that it was "to be paid when called for"; that he called for payment in a month or more from the date of the loan. The presiding judge instructed the jury that the statute of limitations would commence to run from the date of the loan, and that if six years had elapsed from the date of the loan before the writ was made, the plaintiff could not recover. The plaintiff requested the judge to instruct the jury that if the money

was loaned by plaintiff to be paid when called for, then the statute of limitations would not commence to run until it was called for by the plaintiff. But the judge declined so to instruct. Verdict for the defendant.

N. M. Whitmore, 2d, for the plaintiff.

Clay, for the defendant.

By Court, APPLETON, C. J. A promissory note payable on demand is due instantly, and the statute of limitation begins to run from its date. An action may be maintained on a bank bill payable on demand, but having no place therein appointed for payment, without a special demand: *Bryant v. Damariscotta Bank*, 18 Me. 240. It makes no difference, though the note be "on demand, with interest after six months," or to pay "when demanded," or "whenever called upon to do so": *Rice v. West*, 11. Id. 323; *Young v. Weston*, 39 Id. 492; *Kingsbury v. Butler*, 4 Vt. 458; *Waters v. Earl of Thanet*, 2 Q. B. 757.

The debt in this case was due when the loan was made. The defendant is in no worse condition than if he had signed a note payable on demand. By the general current of American authorities, the statute of limitations would, in such case, have commenced running when the debt was created. Whether the loan was payable on demand, or "when called for," can make no difference. It was payable on demand. The statute of limitations is a bar.

The exceptions must be overruled.

CUTTING, DICKERSON, BARROWS, and TAPLEY, JJ., concurred.

ON CERTIFICATE OF DEPOSIT OR NOTE PAYABLE ON DEMAND, STATUTE OF LIMITATIONS BEGINS TO RUN from the date thereof: See *Brummaquin v. Tal-lan*, 89 Am. Dec. 61, note 64. But see, *contra*, *Fells Point S. I. v. Weedon*, 81 Id. 603, and note to *O'Neil v. Bradford*, 42 Id. 578, where this question is discussed.

WHERE THERE IS PROMISE TO PAY AT INDEFINITE TIME, or on the happening of a contingency which is within the control of the promisor, the statute commences to run at once: *McDowell v. Goodwyn*, 12 Am. Dec. 685.

WHERE DEMAND IS NECESSARY, STATUTE DOES NOT BEGIN TO RUN until demand is made: See *Judah v. Dyott*, 25 Am. Dec. 112; *Sherrod v. Woodard*, 25 Id. 714; *Wright v. Hamilton*, 21 Id. 513.

GATES v. THOMPSON.

[57 MAINE, 442.]

MASTER'S RIGHT TO SELL VESSEL IN IMMINENT DANGER OF BECOMING TOTAL LOSS arises from the necessity of acting before the owners can be consulted.

SALE BY MASTER OF VESSEL OF SUCH PARTS OF HER AS BELONG TO PART OWNERS who might have been notified of her peril in time to act in the matter before the sale, but who were not so notified, is void.

MASTER MAY SELL WHOLE OR PART ONLY OF VESSEL, according to the extent of his authority.

TROVER. The opinion states the case.

Granger and Pike, for the plaintiff.

Bion Bradbury and French, for the defendant.

By Court, DICKERSON, J. Trover for the alleged conversion of one sixteenth of a brig. The plaintiffs claim title as original part owners, and the defendant as vendee, of the vessel at a sale by the master from alleged necessity.

At the time of the sale the master owned one eighth, his brother one sixteenth, which the master controlled; Wadsworth Brothers five eighths, the plaintiffs one sixteenth, and the remaining one eighth was owned in New York and Philadelphia.

The master, his brother, and Wadsworth Brothers had their shares well insured; the plaintiffs had no insurance. The master resided in Eastport; L. L. Wadsworth, Jr., of the firm of Wadsworth Brothers, resided in Calais; the plaintiffs had their place of business, and one of them, Gates, resided in Calais.

The vessel went ashore on an island known as one of the "Wolves," in the province of New Brunswick, about twelve miles from Eastport, on the morning of July 6, 1866. The master, leaving her in charge of the mate, arrived in Eastport about noon of the same day. He notified L. L. Wadsworth, Jr., of the disaster, in season for him to reach Eastport that evening. No notice whatever was given to the plaintiffs, nor were they apprised of the disaster till after the sale.

Protest was duly noted, surveyors were appointed, and the vessel was sold at auction on the afternoon of the following day by the master, and struck off to the defendant, as the highest bidder, for \$1,650. L. L. Wadsworth, Jr., was present at the sale.

The defendant got the vessel off about three hours after the

sale, and she was towed into Eastport the next day after the sale, where she was repaired for five thousand dollars. When repaired, the vessel was worth fourteen thousand to fifteen thousand dollars.

All the owners, except the plaintiffs and the owners residing in New York City, acquiesced in the sale, and received their shares of the proceeds.

The verdict was for the defendant, and the learned counsel for the plaintiffs have reserved several questions of law, but the one most confidently relied upon in the argument, and specially calling for the careful consideration of the court, relates to the rulings of the presiding judge as to the legal effect of the neglect of the master to notify the plaintiffs of the disaster.

In general, the master has no authority to sell the ship. There is, however, an exception to this rule, when she meets with a disaster which renders it necessary to sell her, in order to save a part of her value, rather than to run the risk of a total loss.

The master's right to sell in such an emergency arises from the necessity of acting before the owners can be consulted. He acts for them because they have no opportunity to act for themselves. If they are present, his authority to sell ceases. He is bound to exercise the same discretion that an uninsured owner or agent of the underwriters would exercise if present. Hence it is his duty to notify the parties interested of the disaster, when it can seasonably be done, that they may send him instructions, or be present to judge of the situation for themselves. When their discretion may be called into exercise, there is no occasion for the master to exercise his; there is no necessity for him to sell when they may judge of the necessity for a sale themselves. The chance of recovering the vessel is worth as much to the owners as it is to the purchasers. They have a right to the benefit of the choice of the alternatives of risking or selling her, when there is an opportunity for the master to give them seasonable notice of the disaster, and he cannot divest them of this right. If he undertakes to do so by selling the vessel, the sale will be void as to such owners. Nor is it necessary that the master should fraudulently neglect to give such notice to invalidate the sale. It is the master's duty to use the earliest means ordinarily available to convey intelligence of the disaster to his owners, when they may thus be reached in season to act before the

sale; and if he neglects to do this, either from indifference, carelessness, or ignorance of duty, the sale will be void as to such part owners.

This doctrine has been established and recognized in a harmonious series of decisions of courts of the highest authority ever since the right of the master to sell the ship from necessity was conceded.

"The true criterion for determining the master's authority to sell," observes Mr. Justice Hayne, in *New England Ins. Co. v. The Sarah Ann*, 13 Pet. 387, "is the inquiry whether the owners or insurers, when they are not distant from the scene of stranding, can, by the earliest use of the ordinary means to convey intelligence, be informed of the situation of the vessel in time to direct the master before she will probably be lost."

In *American Ins. Co. v. Center*, 4 Wend. 55, the court say: "The master is not authorized to sell the ship or cargo, except in case of absolute necessity, when he is not in a situation to consult with his owner, and when the preservation of the property makes it necessary for him to act for whom it may concern."

"If the property can be kept safely," say the court in *Hall v. Franklin Ins. Co.*, 9 Pick. 466, "until the owners or insurers can be consulted, and have an opportunity, in a reasonable time, to exercise their own judgment in regard to the sale, the necessity to act for them will cease." This was the case of a ship insured in Boston, which went ashore on the Florida shoals, and was taken to Key West, condemned by a survey, and sold by the master. The doctrine is here distinctly laid down that the necessity which will justify the master of a ship in selling her is one in which he has no opportunity to consult the owners or insurers, and which leaves him no alternative.

In *Bryant v. Commonwealth Ins. Co.*, 13 Pick. 543, the court set aside the third verdict rendered for the plaintiff, it appearing that the master sold the cargo, and broke up the voyage, without consulting the owners, when he might have done so in season for them to act before the sale.

So, also, the sale of a vessel by the master on the alleged ground of necessity was held void, in respect to the insurers, because he neglected to notify them when he had the opportunity. In this case, no notice was given to the other part owners by the master, who was himself a part owner, though it might have been given, and on this account the court say

that "if the plaintiff's claim for a total loss stood alone upon the fact of the sale, on the ground that such a sale was authorized by the exigencies of the case, and that thereby the property of the owners was rightfully and legally divested, it is very clear that it could not be maintained": *Pierce v. Ocean Ins. Co.*, 18 Pick. 83. The same doctrine has been recognized in this state: *Stephenson v. Piscataquis Ins. Co.*, 54 Me. 55.

The requested instruction affirmed, as matter of law, that it was the duty of the master to notify the plaintiffs of the peril of the vessel, if he had the opportunity to do so, in season for them to act before the sale; and that if he neglected this duty, and sold the vessel, the sale would be void as to them. It would be difficult to state the law applicable to this case with greater precision. It appears from the evidence that the master had ample opportunity to communicate with the plaintiffs in season for them to be present before the sale, and that he neglected to do so. Nor is there any pretense that he was prevented from so doing by any misadventure, mistake, or accident. Indeed, the only grounds upon which the learned counsel for the defendant undertakes to justify the conduct of the master in this particular are, that it is not necessary to notify all the part owners in such cases, though the master may have the opportunity to do so, and that notice to one of the part owners was sufficient.

Part owners of a vessel are not copartners, but tenants in common. Notice to one part owner is not notice to another, nor has one part owner any right to sell, authorize, or consent to the sale of the interest of his associate part owner. The duty of the master to give the notice in question extends to all the part owners within his means of intercommunication. In this respect there is no distinction between "the small owner" and the large one; each has an equal right to be present and decide for himself whether he will sell his share, or run the risk of losing it, when the master has an opportunity to give him seasonable notice of the peril of the vessel. This duty of the master is not one which he is at liberty to perform or neglect at pleasure. Nor will the same consequences alike follow its neglect and its performance. The law will not sanction acts done in violation of a legal duty. The requirement which the law makes upon the master in this behalf means something or nothing; if it means anything, the plaintiffs were entitled to the benefit of the instruction requested. The relaxation

of this rule, as contended for by the counsel for the defendant, would fritter away one of the great safeguards the law has thrown around the commercial and navigation interests of the country, and put in peril those efficient instrumentalities which have contributed so largely to produce the present advanced state of civilization.

The instruction of the presiding judge as to the effect of the omission to notify "a small part owner," is also objectionable, as calculated to give the jury the impression that the master, as matter of law, must sell the whole, if any, and cannot sell a part of the vessel. The master may sell the whole or a part of the vessel, according to his authority. He may sell his own share, and no more, if he be a part owner; he may also sell the shares of such owners as, being notified, give him authority to sell, and the interests of such part owners as cannot be seasonably notified of the disaster.

"When," says Shaw, C. J., in *Pierce v. Ocean Ins. Co.*, 18 Pick. 83, "a master stands in a double capacity, in one of which, namely, as master, he has no authority to make a sale, and in the other, as owner, he has such authority, and makes a sale, in whatever right or capacity he may profess to act his act would take effect according to his authority." This case is conclusive of the right of the master to make a valid sale of the whole or a part of the vessel, according to the extent of his authority. If he sell the whole when he has authority to sell only a part, the sale will be valid as to that part, and void as to the rest.

As the case must go back for another trial, it is unnecessary to consider the other questions raised in the bill of exceptions, or the motion to set aside the verdict as against evidence.

Exceptions sustained.

Verdict set aside. New trial granted.

APPLETON, C. J., and CUTTING, KENT, and BARROWS, JJ., concurred.

MASTER'S POWER TO SELL VESSEL: See *Butler v. Murray*, 86 Am. Dec. 355, note 361, where other cases are collected; *Duncan v. Reed*, 63 Id. 635, note 638, where this subject is discussed at length.

WITHAM v. WITHAM.

[57 MAINE, 447.]

ONE CO-TENANT CANNOT MAINTAIN REPLEVIN AGAINST THE OTHER for the common property. And where he brings such action against his co-tenant, and fails on that ground, the defendant is entitled to a judgment for the return of the property.

REPLEVIN for a mare, wagon, and harness. The plaintiff was the wife of the defendant, who put in evidence a bill of sale of the property to him and the plaintiff. The jury found that the parties were co-tenants, and returned a verdict for the defendant, upon whose motion the judge ordered a return of the property. The plaintiff alleged exceptions.

Plaisted and Clark, for the plaintiff.

H. Hudson, for the defendant.

By Court, APPLETON, C. J. The plaintiff and defendant are co-tenants of the property replevied. If one takes the common property, the other has no remedy by action, unless in case of unlawful conversion or destruction: *Strickland v. Parker*, 54 Me. 322. He may take it back if he can, but the law is well settled that he cannot maintain replevin, for one co-tenant has an equal right with the other co-tenant to the possession: *Hardy v. Sprowle*, 32 Id. 322; *Wells v. Noyes*, 12 Pick. 324.

The jury having found the fact of co-tenancy, and in favor of the defendant, the presiding judge ordered a return. This was the necessary result. The action not being maintainable, the parties are to be restored to their condition before the suit was instituted. Were it not so, a plaintiff, without right to maintain an action, would have the same benefits as if he had the right. He would succeed in obtaining and retaining possession of the desired property by virtue of a suit, which by law he had no right to bring, and in which, having brought it, he is defeated. The plaintiff, to recover, must show he is the exclusive owner, and has an exclusive right to the possession and control of the property replevied. This he has failed to do. The right of the defendant is equal to his. The goods replevied were not "unlawfully taken or detained from the owner or person entitled to the possession thereof." They were rightfully in the possession of the defendant, and the action not being maintainable, must be restored to him: *Rogers v. Arnold*, 12 Wend. 30.

While the defendant is entitled to a return, yet, if the property replevied be not returned, the measure of damages would seem to be only to the extent of his interest: *Bartlett v. Kidder*, 14 Gray, 449.

The exceptions relate only to the order for a return. They present no question as to whether the wife could maintain a suit against her husband. None such has been argued by counsel, or is before us.

Exceptions overruled.

CUTTING, WALTON, DICKERSON, and DANFORTH, JJ., concurred.

TROVER CANNOT BE MAINTAINED BY ONE TENANT IN COMMON AGAINST HIS CO-TENANT: See *Kilgore v. Wood*, 96 Am. Dec. 440, note 443, where other cases are collected.

ASSUMPSIT CANNOT BE MAINTAINED BY ONE TENANT IN COMMON AGAINST HIS CO-TENANT: See *Hamilton v. Couine*, 92 Am. Dec. 724, note 730.

TRESPASS BY ONE TENANT IN COMMON AGAINST HIS CO-TENANT, WHEN CAN BE MAINTAINED: See *Filbert v. Hoff*, 82 Am. Dec. 493, note 496, where other cases are collected; *Symonds v. Harris*, 81 Id. 553, note 556.

BRIDGES v. SPRAGUE AND PEMBROKE IRON COMPANY, TRUSTEES, AND MITCHELL, CLAIMANT.

[57 MAINE, 543.]

MASTER OF VESSEL BECOMES OWNER PRO HAC VICE, and not a partner of the owner, where he sails her under a contract at the halves, — he to victual and man her, and the owner to have half of her earnings. And the freight money earned during the continuance of such contract belongs to the master alone, and may be held under a timely foreign attachment against him.

DEBT on a judgment commenced by trustee process. The facts are stated in the opinion.

George Walker, for Mitchell.

B. Rogers, for the plaintiff.

By Court, BARROWS, J. The creditor of a shipmaster who was sailing a schooner on shares, — he to victual and man her, and the owner to have half her earnings, — after the freight money had been earned and the cargo delivered, as appears by the disclosure of the trustee, summoned the consignee (who was to pay the freight) in a process of foreign attachment,

seeking to hold the amount due for freight for the master's debt. After the service of the trustee writ, the owner of the schooner notified the trustee of his claim to the funds; the trustee paid the master one half the freight money, which he used to pay the crew and other disbursements for the vessel, and now the owner of the vessel appears and claims the remainder of the money.

At *nisi prius*, the trustee was charged for half the amount of the freight money; and the case is before us on exceptions to this ruling.

We think that neither the claimant nor the trustee can have any just grounds to complain of this ruling. The plaintiff does not, because the half is sufficient to cover his debt and cost.

The owner of the schooner, who makes this claim, had made the master the owner for the voyage. It is well settled that such an arrangement between the owner and master as existed in this case, according to the testimony of the master, makes the master owner *pro hac vice*, and creates no partnership between them: *Thompson v. Snow*, 4 Me. 265 [16 Am. Dec. 263], and cases there cited.

By such an arrangement, the owner is relieved from any personal liability upon the contracts of the master for supplies furnished to the vessel: *Winsor v. Cutts*, 7 Me. 261; *Houston v. Darling*, 16 Id. 413; or to the shipper of goods on board the vessel for any malfeasance in the performance of the contract for carrying them: *Sproat v. Donnell*, 26 Id. 185 [45 Am. Dec. 103]. And he is also precluded from maintaining any action for freight earned by the vessel during the continuance of such an arrangement, and from interposing his claim as owner to prevent the party liable for the freight money from off-setting against it any claim which he may have against the master, who is held to be the only person entitled to maintain an action for the recovery of it: *Manter v. Holmes*, 10 Met. 402.

When the owner thus voluntarily divests himself of his ownership temporarily, he must be content to take his place among the other creditors of the master, to whom he has intrusted his property. To the master he must look for the faithful performance of his contract; he cannot call upon the shipper or consignee for a share of the freight money. That is payable to the master only, and, like any other credit of the master's, must be holden to any vigilant creditor who makes a timely foreign attachment.

The owner, by his contract, has substituted the master in his place for the time being, and cannot claim as owner.

In *Richardson v. Whiting*, 18 Pick. 530, the schooner was engaged in a general coasting business for the owners. Whiting, the master and principal defendant, had no interest in her except as master, and no lien for wages or disbursements, for all which he had been fully reimbursed. He was not the owner for the voyage, and had no interest in the freight money which had been earned, or any claim to it except as agent for the owners. Certain *dicta* in *Williams v. Williams*, 23 Me. 17, seem opposed to the doctrine which we here affirm, but they were not necessary to the decision of that case; for there the freight money had been collected, and the master had received his share, and the remainder of it had come into the defendant's hands with a knowledge that the plaintiff was equitably entitled to it as owner of the vessel, and he had promised to pay it to the plaintiff when received. The *dicta* implying that it could not be holden by a creditor of the master attaching it by trustee process before it had been collected, and the master's share severed by his own act, cannot be deemed an authority that will avail the claimant here.

Exceptions overruled.

APPLETON, C. J., and CUTTING, KENT, WALTON, and DANFORTH, JJ., concurred.

MASTER, WHEN OWNER PRO HAC VICE: See *Wordin v. Bemis*, 85 Am. Dec. 255; *McLellan v. Coa*, 58 Id. 736, note 733; *Giles v. Vigoreux*, 58 Id. 704, note 705; *Sproat v. Donnell*, 45 Id. 103.

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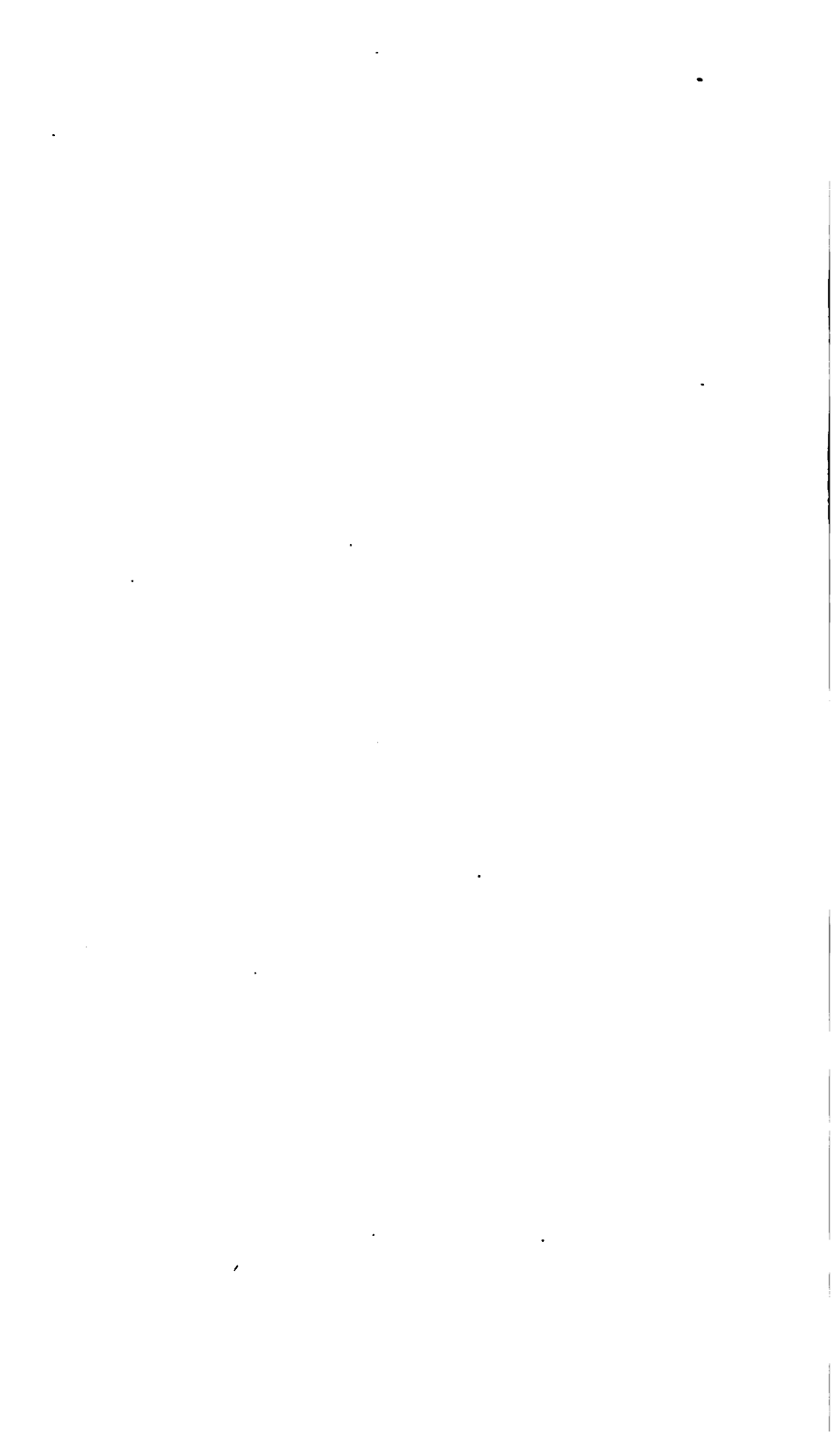
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ADVERSE POSSESSION.

1. OPEN AND EXCLUSIVE POSSESSION OF GRIST-MILL, AND GRIST-MILL PRIVILEGE, for upwards of twenty-two years confers upon the possessor a good title thereto, even against one to whom he had conveyed the same prior to his taking such possession. *Hines v. Robinson*, 772.
2. STATUTE PROVIDING THAT TEN YEARS' ADVERSE POSSESSION UNDER TAX DEED shall bar title of original owner applies to such possession commencing before the passage of the statute, if a reasonable portion of the term remained after its passage in which he might have commenced suit; otherwise the former limitation of twenty years applies. *Mecklem v. Blake*, 68.
3. ADVERSE POSSESSION, TO BE AVAILABLE AS DEFENSE, OR AS TITLE, MUST HAVE BEEN CONTINUOUS both in time and in interest. A party, in order to make up five years of adverse possession, cannot add to his own possession that of those who preceded him, when he did not enter into possession under or through them. *San Francisco v. Fulda*, 278.
4. ASSERTION OF RIGHT OF POSSESSION, WHETHER BY WORDS OR BY ACTION, is not the equivalent of possession in fact for the purposes of the statute of limitations. If the continuity of possession is broken by fraud or a wrongful entry, the protection of the statute is lost. *Id.*
5. WHERE DEFENDANT CLAIMING BENEFIT OF STATUTE OF LIMITATIONS HAS NOT BEEN IN POSSESSION five years, but seeks to add the possession of his predecessor to that of his own, his predecessor will be deemed to have held in subordination to the true title, unless he shows a privity between himself and his predecessor; and if he does not show such privity, he cannot dispute this presumption, and show that his predecessor did, in fact, hold adversely. *Id.*

6. WHERE DEFENDANT IN EJECTMENT PLEADS FIVE YEARS' ADVERSE POSSESSION, and the parties stipulate that the plaintiff never was in possession, but the stipulation admits title to have been in the plaintiff, the stipulation will be construed as having reference to actual possession. *Id.*

AGENCY.

1. TEAMSTER EMPLOYED BY MILL-OWNER TO DELIVER FLOUR TO RAILROAD COMPANY for transportation has no power by virtue of his employment to direct the delivery of the flour by the company to a third person; and the agents of the company are bound to know this, and if they so deliver the flour, the company is liable as for a conversion. *Sawyer v. Chicago &c. R'y Co.*, 49.
2. STATEMENT OF TEAMSTER IN EMPLOY OF MILL-OWNER THAT FLOUR DELIVERED BY HIM to a railroad company was "for" a certain person does not imply that it was to be delivered by the company to him without further instructions from the owner. *Id.*
3. PRINCIPAL IS LIABLE FOR DAMAGES SUSTAINED FROM ACT OF AGENT, which is within the general scope of his authority, or which is specially approved by the principal. *Kline v. Central P. R. R. Co.*, 282.
4. PARTNERS WHO HAVE AUTHORIZED THEIR AGENT by written power of attorney to draw bills of exchange against them, and paid such bills when drawn, thus inducing the public to believe him their agent, cannot avoid payment of a bill drawn by him, on the ground that it was unauthorized by them. *Caldwell v. Neil*, 788.

See COMMON CARRIERS, 7-9; INSURANCE, 23-28.

ANIMALS.

See COMMON CARRIERS, 6; EXEMPTIONS.

ARBITRATION AND AWARD.

1. AWARD OF ARBITRATORS WILL NOT BE VACATED ON GROUND of a mistake, alleged by the party moving to vacate to have been made by him in his testimony on the hearing, in respect to a matter to which his attention was distinctly called. *Bancroft v. Grover*, 195.
2. AWARD BY ARBITRATORS IN GENERAL TERMS THAT INCLUDE all matters submitted, without specific mention of any particular matter or all matters as passed upon, is sufficient, and is to be construed as including all the matters submitted. *Id.*
3. DESCRIPTION OF NOTE IN AWARD as "the note of A B," is not uncertain, if the note can be identified by extrinsic evidence. *Id.*
4. AWARDS SHOULD BE FAIRLY AND LIBERALLY CONSTRUED, with a view to give them effect, and to accomplish the ends of justice and the intentions of the parties. *Id.*

ASSIGNMENTS.

1. ASSIGNMENT OF PART OF ENTIRE DEMAND, UNLESS WITH CONSENT OF DEBTOR, is void at law, but in equity the rule is otherwise. *Graia v. Aldrich*, 423.
2. AVOWMENT OF CONSENT OF DEBTOR TO ASSIGNMENT OF PART OF DEMAND was necessary at common law to enable the creditor to recover; but under the California Code, which follows the equitable doctrine, a complaint is not demurrable, for lack of facts, if it fails to contain such avowment. *Id.*

3. **ASSIGNEE OF PART OF ENTIRE DEMAND MAY, IN CALIFORNIA, RECOVER IN HIS OWN NAME**, without making the holders of the remainder of demand parties, if the debtor consented to the assignment; but if he did not consent, the complaint will be bad on demurrer for want of parties, unless the other holders are joined. *Id.*
4. **AVERMENT IN COMPLAINT IN ACTION UPON ASSIGNMENT OF PART OF ENTIRE DEMAND** in the following words, "of which said assignment defendants have had due notice," is not an allegation that the defendants knew of or assented to the assignment at the time it was made. *Id.*
See ASSUMPSIT, 4; ESTOPPEL, 14.

ASSUMPSIT.

1. **PROPRIETOR OF LOTTERY WHO EMPLOYS PERSON TO SELL TICKETS, AND RECEIVE PROCEEDS**, cannot recover the proceeds from him, the sale of lottery tickets being criminal by statute; for the obligation to pay over the money received for tickets is so connected with the illegal contract to sell them as to be inseparable from it, and a court will not lend it its aid to enforce it. *Lemon v. Grosskopf*, 58.
2. **PROCEEDS OF SALE OF LOTTERY TICKETS PAID BY AGENT FOR SALE THEREOF** to another agent for their sale, with directions to pay them over to the proprietor of the lottery, may be recovered by the latter from the second agent, for his obligation to pay over this money is disconnected from his illegal contract to sell tickets. *Id.*
3. **MONEY PAID TO THIRD PERSON FOR USE OF PLAINTIFF** may be recovered from such person, though the money is the proceeds of an illegal transaction. *Id.*
4. **MONEY COLLECTED UPON JUDGMENT UNDER INVALID ASSIGNMENT MAY BE RECOVERED** of the assignee by a judgment creditor of the party rightfully entitled thereto. *Blood v. Marcuse*, 435.
5. **PARTY WRONGFULLY RECOVERING DAMAGES AGAINST THIRD PERSON IS NOT LIABLE TO PLAINTIFF WHO IS REALLY ENTITLED TO SUCH DAMAGES**. Where C. and S. have obtained and collected a judgment against R. for damages for the taking and conversion of property alleged to belong to C. and S., D. cannot compel C. and S. to pay over the amount to him, on the ground that the property, in fact, belongs to him. *Dent v. Cotsenhausen*, 111

See WAREHOUSEMEN.

ATTACHMENTS.

1. **PURPOSE OF ATTACHMENT IS TO HOLD PROPERTY OF DEFENDANT AS SECURITY** for such judgment as may be rendered, and when the judgment is rendered, and becomes a lien upon the property attached, the lien of the attachment becomes merged in that of the judgment, and its only effect thereafter is to preserve the priority thereby acquired, which priority is maintained and enforced under the judgment. The attachment lien does not revive on the expiration of the judgment lien. *Bagley v. Ward*, 256.
2. **UNITED STATES MARSHAL MAY ATTACH PROPERTY WITHOUT SEEING IT OR TOUCHING IT**. His duty is performed by taking it into his custody, not *manu forti*, but by placing some person in charge, and making a return on the writ. The marshal thenceforth becomes chargeable with its safe-keeping. *Jones v. McQuirk*, 556.

3. **DUTY AND LIABILITY OF UNITED STATES MARSHAL WITH RESPECT TO PROPERTY IN HIS CUSTODY.** — Where he has taken property into his custody under a process *in rem* issued out of an admiralty court, the owner is relieved of all concern about it, and is not required to be present to protect it. The sole responsibility of its safe-keeping is upon the officer; it is his duty to use due diligence to keep it safe, and he will be liable to the owner for any damage to the property resulting from a want of such diligence. *Id.*
4. **"DUE DILIGENCE" REQUIRED OF OFFICER IN TAKING CARE OF PROPERTY ATTACHED** under process *in rem* is such diligence as a careful, prudent man, of reasonable sense and judgment, might reasonably be expected to take if the property belonged to himself. *Id.*
5. **UNITED STATES MARSHAL ALONE IS LIABLE FOR NEGLIGENT AND INJURIOUS ACTS OF HIS DEPUTY** or assistants in taking care of attached property. *Id.*
6. **DUTY AND LIABILITY OF UNITED STATES MARSHAL AS TO STEAM-TUG TAKEN BY HIM UNDER PROCESS IN REM.** — If he puts the tug in charge of a custodian, and while so situated, it springs a leak and sinks, for want of proper care and attention on the part of the custodian, the marshal is liable to the owner as well as to the libellant for the damage occasioned thereby. Due diligence requires that the officer should know whether the vessel leaks; whether the place she occupies is a proper one; whether, in the removal of pipes which are taken out by the direction of the custodian, any holes have been left through which water may enter the vessel; what bad effect ice may have upon her, which may be avoided, it being in the winter season, and what will be her condition in case of a sudden rise of water and breaking up of the ice. *Id.*
7. **IN ABSENCE OF FRAUD AND COLLUSION, INTERVENOR IN ATTACHMENT** will not be permitted to urge defenses which are personal to defendant. Questions of the admissibility of the testimony and the formality and regularity of the pleadings are matters for the consideration of defendant, and if he sees fit to waive them, he may. *Fleming v. Shields*, 719.
8. **INTERVENOR IN ATTACHMENT** can only show that the property attached is his; he cannot contest the plaintiff's claim against defendant, nor urge any irregularities in the suit. *Id.*

ATTORNEY AND CLIENT.

PLAINTIFF'S ATTORNEY MAY CONTINUE SUIT AGAINST DEFENDANT TO RECOVER AMOUNT OF HIS FEE AFTER PLAINTIFF HAS DISMISSED. Where in an action of trover plaintiff and defendant fraudulently settle the same with notice of the lien of attorney for plaintiff for his fee, such attorney has the right to prosecute the suit against defendant to recover the amount of the fee, provided the plaintiff is entitled to recover anything from defendant upon the trial. *Jones v. Morgan*, 458.

See EJECTMENT, 4.

RAIL.

1. **IMPRISONMENT OF CITIZEN BY LEGITIMATE ORDERS** of a military commander has the same force and effect as if he were confined upon a proper warrant from a civil tribunal. *Belding v. State*, 214.
2. **ACT OF GOD, OF OBLIGER, OR OF LAW,** will excuse a surety in a recognizance conditioned for the appearance of his principal to answer an indictment. *Id.*

3. **RECOGNIZANCE AND RECORD OF ITS FORFEITURE** raises a strong presumption of the liability of the surety. *Id.*
4. **IF SURETY IN RECOGNIZANCE CAN SHOW** by legitimate and satisfactory proof that his principal was duly arrested and imprisoned, and beyond the reach of his power at the time of the forfeiture of the bond, he is excused from liability for the non-appearance of his principal. *Id.*

BAILMENTS.

BORROWER OF CHATTEL WILL NOT BE PERMITTED TO SET UP TITLE IN HIMSELF until he has restored the chattel to the lender. *Simpson v. Wren*, 511.

BONA FIDE PURCHASERS.

BONA FIDE PURCHASER OF LAND, without notice of mistake in the certificate of a deed, does not by reconveying to his grantor thereby transmit to him the superior equity he acquired as an innocent purchaser. *Simpson v. Montgomery*, 228.

See **EXECUTIONS**, 17, 18.

BONDS.

1. **PENALTY OF BOND WILL BE TREATED AS LIQUIDATED DAMAGES**, upon a breach of the bond, if the agreement therein is to do, or abstain from doing, an act, and the damages are such that they cannot be estimated with certainty. *Studabaker v. White*, 628.
2. **BOND FOR ONE THOUSAND DOLLARS, CONDITIONED THAT OBLIGOR SHALL NOT ENGAGE IN LIQUOR TRAFFIC** within a county named, after a specified date, is valid in Indiana. *Id.*

CHAMPERTY.

AGREEMENT IS NOT CHAMPERTOUS where a trustee sells the land of one to another at public auction, and the creditors of the former agree to credit the amount of the bid on his notes held by them, and not to exact payment of the purchaser, unless the title acquired at the sale should prove to be valid; for the object of the sale is as fully accomplished as if the money had been paid to the trustee, and by him paid to the holders of the notes. *Simpson v. Montgomery*, 228.

COMMON CARRIERS.

1. **COMMON CARRIER IS LIABLE AS INSURER OF GOODS TRUSTED TO HIM FOR TRANSPORTATION.** *Adams Exp. Co. v. Darnell*, 562.
2. **LIABILITY OF CARRIER, WHERE CONSIGNEE HAS NOTICE OF ARRIVAL OF GOODS, IS NOT THAT OF INSURER**, after he has attempted to deliver the goods, but is prevented from performing that duty by the willful absence of the consignee from his place of business during business hours. He must, however, still exercise ordinary care in preserving the goods, and will be liable for their loss if he is negligent in this respect. *Id.*
3. **CARRIER'S DUTY TO DELIVER, AND CONSIGNEE'S DUTY TO RECEIVE, ARE RECIPROCAL.** This doctrine must be maintained to prevent wrong. *Id.*
4. **ERRONEOUS INSTRUCTION AS TO REASONABLE TIME FOR RECEIVING GOODS.** — An instruction to the jury that if the consignee was at the place where the goods were to be delivered by the carrier on the day following their arrival, when he had notice of the time of arrival, it

- would be within a reasonable time for the purpose of receiving such goods, is erroneous, as it tells the jury plainly that those facts would not terminate the carrier's liability as an insurer. *Id.*
5. COMMON CARRIER OF CATTLE BY STEAMBOAT is liable for their loss during transportation, if occasioned by negligence or want of care on the part of the officers of the boat. *Pitre v. Offutt*, 749.
 6. USAGE OR CUSTOM AMONG STEAMBOATS, that they are not liable for the loss of live-stock during transportation, will not relieve them from responsibility for loss through negligence, unless knowledge of such usage or custom was brought home to the shipper. *Id.*
 7. RAILROAD COMPANY IS BOUND BY ITS FREIGHT AGENT'S CONTRACT TO TRANSPORT GOODS within a specified time, if it be a reasonable time. *Strohn v. Detroit etc. R. R. Co.*, 114.
 8. RAILROAD COMPANY IS NOT ABSOLUTE INSURER OF GOODS which its agent has contracted to deliver within a specified time; but their non-delivery will be excused if they are destroyed within the prescribed time by the act of God or of the public enemy. *Id.*
 9. CONTRACT TO DELIVER GOODS WITHIN SPECIFIED TIME IS NOT SHOWN WHEN. — A mere statement by a railroad company's agent that the ordinary time for transportation over the proposed route is a certain number of days does not constitute an agreement to carry in that time; nor is it sufficient to overcome the effect of the bills of lading or receipts as evidence of the real contract. *Id.*
 10. BURDEN OF PROOF IS ON COMMON CARRIER to excuse non-delivery of freight received for transportation. *Chapman v. New Orleans etc. R. R. Co.*, 722.
 11. WHERE COMMON CARRIER RECEIVES GOODS FROM PERSON, AND HE AFTERWARDS SUES CARRIER FOR THEIR LOSS, the carrier will not be allowed to dispute his title by setting up the title of a third person which is not being enforced against it. *Wallace v. Matthews*, 473.
 12. COMMON CARRIER CANNOT, BY ANY ACT OF HIS OWN, TO WHICH SHIPPER DOES NOT CONSENT, LIMIT HIS LIABILITY, but the parties may make an express contract for that purpose, and if they both have a fair opportunity to understand the terms of the contract entered into, they are bound by it. *Id.*
 13. LIMITATION OF CARRIER'S LIABILITY BY BILL OF LADING NOT SIGNED BY CONSIGNOR. — Where defendant's railroad, in consequence of the war, was in a dilapidated condition, and their supply of rolling stock limited, and they had refused to receive freight for shipment unless upon a qualified liability, to secure which they had printed bills of lading limiting their liability, and where plaintiff, through himself and his agents, had knowledge of the condition of the road and the terms upon which goods were received, and where plaintiff, desiring to ship goods, filled out one of said printed bills of lading and brought it to defendant to sign, he will be held to a knowledge of its contents and an assent to its terms. *Id.*
 14. COMMON CARRIER IS BOUND TO RECEIVE GOODS TENDERED HIM FOR SHIPMENT, SUBJECT TO HIS COMMON-LAW LIABILITY, unless the shipper sees fit to limit his liability by contract or agreement. *Id.*

COMPROMISE.

COMPROMISE OF DISPUTED CLAIMS IS BINDING UPON PARTIES as a mutual settlement, so far as the question of consideration is concerned. *Furness & M. I. Co. v. Chesnut*, 492.

CONFLICT OF LAWS.

CONTRACT VOID IN STATE WHERE MADE cannot ordinarily be enforced in another state. *Ford v. Buckeye State I. Co.*, 663.

See **CONTRACTS**, 9.

CONSTITUTIONAL LAW.

AUTHORITY TO HEAR AND DETERMINE ACTIONS AND PROCEEDINGS AT CHAMBERS may be conferred upon judges by the legislature. *Brewster v. Hartley*, 237.

See **CORPORATIONS**, 28-30.

CONTRACTS.

1. **MUST OFFER TO PERFORM.** — In cases of mutual contracts, such as an agreement to haul cotton, and to pay so much per bag for such work, the person complaining of the other's failure to execute must show an offer to perform on his own part. *Bruce v. Crews*, 467.
2. **IF FOR GOOD AND VALID CONSIDERATION** one promises to do two things, one legal and the other illegal, the former is binding, unless the two are so mingled and bound together that they cannot be separated, in which case the whole is void. *Hanauer v. Gray*, 226.
3. **PROMISE TO PAY NOTE IN CONFEDERATE BONDS** or in Tennessee money will be enforced as to the latter, it being valid. *Id.*
4. **CONTRACT WHEREBY ONE AGREES FOR HIRE TO WORK FOR PASSAGE OF BILLS BY LEGISLATURE** is not void as against public policy, provided he does not conceal his interest in the matter, but lets it be known and understood by the members whose judgment he undertakes to influence. *Miles v. Thorn*, 384.
5. **NOT IN RESTRAINT OF TRADE.** — Contract not to conduct or carry on a particular business, in a particular town, for a definite and reasonable time, if upon sufficient consideration, is valid. *Jenkins v. Temples*, 482.
6. **VALID CONTRACT NOT TO CARRY ON BUSINESS WITHIN CERTAIN TOWN** need not contain a provision stipulating the damages which its breach shall occasion. The plaintiff in such case is entitled to recover the actual damage which he has sustained. *Id.*
7. **DAMAGES FOR BREACH OF CONTRACT NOT TO CONDUCT BUSINESS WITHIN CERTAIN TOWN** are not too remote to warrant a recovery. The plaintiff is entitled to recover his actual damages. *Id.*
8. **PROMISE TO SETTLE DOUBTFUL RIGHT, OR TO GET RID OF DOUBTFUL LIABILITY**, is BINDING, and made upon a good and valuable consideration, although the promisor was mistaken in regard to his liability. *Knotts v. Preble*, 514.
9. **VALIDITY OF CONTRACT IS TO BE GOVERNED BY LAW OF PLACE WHERE IT IS MADE**, as a general rule; although the laws of the state where the contract is made will not be permitted to contravene the positive laws, institutions, and policy of the state where the contract is sought to be enforced. *Mumford v. Canty*, 525.
10. **AGREEMENT, FOR CONSIDERATION, TO DRAUGHT BILL FOR FRANCHISE** in favor of another, and to place it in the hands of some member of the legislature to be introduced in that body, but containing no promise to work for its passage either secretly or openly, is not *contra bonos mores*. *Miles v. Thorn*, 384.

See **CHAMPERTY**; **CONFLICT OF LAWS**; **GAMING**; **INSURANCE**, 29; **MARRIED WOMEN**; **UNINCORPORATED SOCIETIES**.

CORPORATIONS.

1. **RIGHTS OF STRANGERS DEALING WITH CORPORATION MAY VARY** according as they are considered with reference to the corporation itself, its stockholders, or its creditors. *Miners' Ditch Co. v. Zellerbach*, 300.
2. **THERE ARE THREE CLASSES OF CORPORATIONS**; namely, public municipal corporations, the leading object of which is to promote the public interest; quasi public corporations, having in view some public enterprise in which the public interests are directly involved, as railroad, turnpike, and canal companies; and corporations strictly private, the object of which is to promote private interests. *Id.*
3. **TERM "ULTRA VIRES," USED IN REFERENCE TO ACTS OF CORPORATION, IS EMPLOYED IN DIFFERENT SENSES.** An act is said to be *ultra vires* when it is not in the power of the corporation to perform it under any circumstances, in which case the act is void *in toto*, and the corporation may avail itself of the plea. An act is also said to be *ultra vires* with reference to the rights of certain parties, when the corporation cannot perform it without their consent; and it may also be *ultra vires* with reference to some specific purpose, when the corporation cannot perform it for that purpose. When the act is *ultra vires* in the last two senses, the right of the corporation to avail itself of the plea will depend upon the circumstances of the case. *Id.*
4. **CORPORATION ORGANIZED FOR PURPOSE OF OWNING DITCHES FOR CONVEYANCE AND SALE OF WATER HAS POWER** to sell and convey all its corporate property, provided the sale is made for corporate or lawful purposes, and strangers taking a conveyance are entitled to assume, as against the corporation, that the sale was for a lawful purpose. Such sale and conveyance may be made to any person, natural or artificial, capable of taking, and the stockholders of one or more corporations may form themselves into a new corporation, and the property of one or both of the old corporations may be conveyed to the new corporation. *Id.*
5. **DEED IS ADMISSIBLE IN EVIDENCE AS DEED OF CORPORATION**, where it purports to be such, is signed by the trustees as trustees, and has the corporate seal attached. It is itself *prima facie* evidence of the regular and duly authorized execution of the same, and it devolves upon the party contesting its validity to overthrow this presumption. *Id.*
6. **CORPORATION CANNOT AVAIL ITSELF OF INVALIDITY OF SALE AND CONVEYANCE OF ALL ITS PROPERTY** for an illegal purpose, in an action to recover the property from a stranger who purchased it after the contract of sale and conveyance was fully executed on both sides, and with knowledge of that fact. *Id.*
7. **CONCEDING UNLAWFULNESS OF SALE BY CORPORATION OF ALL ITS PROPERTY TO ANOTHER CORPORATION**, and receiving in payment therefor the stock of the grantee, to be distributed among its own stockholders, yet, if such contract has been fully executed, the corporation itself cannot recover back the property sold, or set aside the contract on account of its illegality. *Id.*
8. **CONSTRUCTION OF SECTION 13 OF CALIFORNIA CORPORATION ACT OF 1853.**—The prohibition in the thirteenth section of the California corporation act of 1853 against the declaration of dividends, except from the surplus profits, and against the division or withdrawal of capital, is directed against the trustees, and is designed to protect creditors as such, and to protect the stockholders against mismanagement in distributing capital stock in the form of dividends. *Martin v. Zellerbach*, 365.

9. SALE BY CORPORATION OF ALL ITS PROPERTY TO ANOTHER CORPORATION, to be paid for in stock of the latter, which stock is to be distributed among the stockholders of the former, or any other arrangement which will have the effect to withdraw the capital of an incorporated company and turn it over to the stockholders, except in the manner provided by law, is in violation of that provision of the thirteenth section of the California corporation act of 1853, which forbids the trustees "to divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company," and is void as to any creditor of the corporation, either prior or subsequent, who had no notice of the arrangement at the time of giving the credit. *Id.*
10. BY TERM "CAPITAL STOCK," AS USED IN PROHIBITION of section 13 of the California corporation act against dividing or distributing the capital stock, the statute intends the capital of the corporation on which it transacts its business, whether such capital consists of money, property, or other valuable commodities. *Id.*
11. WHERE EXERCISE OF CORPORATE POWER HAS BEEN REGULATED BY STATUTE, the corporation cannot, by its by-laws, resolutions, or contracts, change the mode of the exercise of that power. *Brewster v. Hartley*, 237.
12. WHERE STATUTE EXPRESSLY DECLARES WHO SHALL BE ENTITLED TO VOTE FOR DIRECTORS of a corporation, the corporation has no authority to extend or limit the right as regulated by the statute. *Id.*
13. WHERE STATUTE GIVES STOCKHOLDERS OF RAILROAD CORPORATION POWER TO ELECT ITS DIRECTORS, the corporation cannot deprive the stockholders of this power. *Id.*
14. WHERE CORPORATION INDEBTED TO ONE PERSON ISSUES TO ANOTHER AS TRUSTEE, as security for the debt, shares of its capital stock to be re-transferred to the corporation upon payment of the indebtedness, the transaction constitutes a pledge of the stock. The general property in the stock in such a case is in the pledgor, the corporation. *Id.*
15. WHERE CERTIFICATE BOOK OF CORPORATION SHOWS THAT STOCK IS HELD BY PERSON AS TRUSTEE, the officers of the corporation are charged with notice that he does not hold the stock in his own right. Such officers are charged with notice of a contract to which the corporation is a party. *Id.*
16. STOCK OWNED BY CORPORATION CANNOT BE VOTED, although held by a trustee. *Id.*
17. CHAPTER 1 OF ACT OF 1850, CONCERNING CORPORATIONS, WAS NOT REPEALED by the act of 1851, although by a typographical error in the statutes of 1851, page 443, section 31, as printed, the whole of that act appears to have been repealed. The act, as enrolled, shows that only chapter 3 of the act of 1850 was repealed. *Id.*
18. RAILROAD CORPORATION CANNOT ISSUE CERTIFICATES OF STOCK until they are fully paid for. *Id.*
19. CERTIFICATES OF STOCK OF CORPORATION ISSUED TO CREDITOR THEREOF, as a pledge to secure his debt, are illegally issued, and cannot be voted by any person. *Id.*
20. FUNDS OF CORPORATION ARE TO BE DISTRIBUTED AMONG THOSE WHO ARE ITS STOCKHOLDERS at the time when the dividend is declared, no matter when such funds accrued. *Goodwin v. Hardy*, 758.
21. RELEASE, BY CREDITOR OF CORPORATION, OF STOCKHOLDER'S LIABILITY FOR DEBT, by an instrument under seal, discharges the corporation and the other stockholders, to the same extent as the one to whom the release

- is executed is discharged. Thus if the release be of the releasee's proportion of the indebtedness of the corporation, the corporation and other stockholders are only released *pro tanto*. *Prince v. Lynch*, 427.
22. RELEASE OF STOCKHOLDER FROM LIABILITY FOR DEBT BY CREDITOR OF CORPORATION is sufficient, in California, to support the plea of payment by another stockholder, in an action against him for his proportion of the debts of the corporation. *Id.*
23. POWERS AND DUTIES OF MAYOR AND COUNCIL. — Mayor and council of Macon have power and authority to keep the streets, alleys, etc., in good condition; and as public officers, it is their duty to exercise this power, and to keep the streets, alleys, lanes, and sidewalks in such condition that persons passing over and along them may do so with safety and convenience. For their neglect to remove nuisances likely to endanger life or limb, they are liable. *Parker v. Macon*, 486.
24. CRUMBLING BRICK WALL LEFT BY FIRE MUST BE TORN DOWN BY CITY AUTHORITIES. — Crumbling brick wall, two stories high, left, after the burning of a house, in an insecure condition, and liable to fall upon the sidewalk, should be pulled down and removed by the city authorities, although it is not in the street; and for their failure so to do, they will be liable for resulting damages. *Id.*
25. BRICK WALL LEFT STANDING AFTER BURNING OF BUILDING, if it is strong and solid, may be permitted to stand by the city authorities; and if it is thrown down by a tempest or other act of God, and injures a person, they will not be liable to him; but if the wall was weak and crumbling, or likely to fall, it is their duty to remove it, and they will be liable for neglecting so to do. *Id.*
26. WHERE CITY IMPROVEMENT WAS UNAUTHORIZED AT TIME IT WAS CONTRACTED FOR and made, the legislature may subsequently confer authority on the city council to adopt it, and to assess and collect a tax to pay for it. *Dean v. Charlton*, 205.
27. POWER OF CITY TO IMPROVE STREETS AT EXPENSE OF LOT-OWNERS. — A city was empowered by its charter to improve streets at the expense of adjoining lot-owners, but only under contract let to the lowest bidder: *Held*, that the city could not contract for laying a patented pavement at the expense of such lot-owners, the exclusive right to lay which was patented and owned by one firm, although such firm was willing to permit any one to use the patent in that city at a fixed royalty. *Id.*
28. INDEBTEDNESS INCURRED BY INCORPORATED TOWN IS NOT EXTINGUISHED by the change of the town into a city by an act of the legislature. *Olney v. Harvey*, 530.
29. JUDGMENT WHICH IS NULLITY BECAUSE RENDERED AGAINST CITY COUNCIL INSTEAD OF CITY, MAY BE VACATED by the court at a subsequent term. *Id.*
30. COURT HAS SAME JURISDICTION OVER CITY AS IT WOULD HAVE HAD OVER TOWN, where, pending an action against the town, the town is changed into a city by an act of the legislature. *Id.*
31. MUNICIPAL CORPORATION MAY BE COMPELLED BY MANDAMUS TO PAY JUDGMENT RENDERED AGAINST IT, there being no other adequate remedy, as an execution cannot be levied upon its property. *Id.*

CO-TENANCY.

1. BUILDING BY TENANT IN COMMON OF EXCHELSEOR-MILL SO NEAR TO GRIST-MILL owned by him and his co-tenant as to darken the grist-mill, and

prevent access to its underworks for the purpose of repairing them, and the use of the yard in front of it as a place for the piling of lumber in such a manner as to exclude customers from the grist-mill, constitute such an injury to the common property as will give the co-tenant a right of action. *Hines v. Robinson*, 772.

2. TENANT IN COMMON MAY MAINTAIN ACTION AGAINST HIS CO-TENANT and a stranger for using water for another mill, which rightfully belongs to a mill that is the common property of such co-tenants. *Id.*
3. ONE TENANT IN COMMON MAY MAINTAIN ACTION AGAINST HIS CO-TENANT for an injury to the common property. *Id.*

See PARTITION; REPLEVIN.

COVENANTS.

1. COVENANT OF SEISIN IS COVENANT OF INDEMNITY AGAINST ACTUAL DAMAGE arising from want of lawful title; and it runs with the land until such damage has actually arisen to the party holding possession under the deed. *Macklem v. Blake*, 68.
2. GRANTEE CAN RECOVER FOR BREACH OF COVENANT OF SEISIN NO MORE THAN NOMINAL DAMAGES, if at all, where there has been no eviction or other actual injury. *Id.*
3. GRANTEE DESIRING TO RESCIND FOR WANT OF TITLE AND TO RECOVER PURCHASE-MONEY paid, and interest, must first tender his grantor a reconveyance and the possession. *Id.*
4. COVENANT FOR CONFIRMATION OF MEXICAN TITLE TO LAND is not satisfied by a title to the same land obtained by entry and purchase. *Smith v. Lawrence*, 344.
5. ACTS CONSTITUTING BREACH OF COVENANT FOR "QUIET AND PEACEABLE POSSESSION," AND SLANDER OF PURCHASER'S TITLE—EQUITIES OF PURCHASER ARISING THEREFROM AS TO ACTUAL DAMAGES IN SUIT TO FORECLOSE MORTGAGE FOR PURCHASE-MONEY. — V. bought of A. unimproved city lots, at a speculative price, with the expectation, known to A., of reselling them at an advance, should a railroad depot be located near them. The depot was so located, and A. brought suit to set aside his deed, alleging that it had been obtained by fraud. He also procured himself to be made a defendant in an action for the partition of lands, his interest in which had passed to V. by the terms of said deed, and by his answer therein denied V.'s title. In consequence of these acts, V. was prevented from selling said lots at the prices then ruling, and until prices had greatly depreciated, when A. discontinued the action to set aside his deed, and withdrew his answer in the partition suit. A. then brought an action to foreclose V.'s mortgage for the purchase-money. *Held*, that said acts were a breach of A.'s covenant for "quiet and peaceable possession," and that V. was equitably entitled to have the actual damages resulting to him from said acts of A. deducted from the mortgage debt. *Aberly v. Vilas*, 165.
6. EXISTENCE OF EASEMENT OBVIOUSLY AND NOTORIOUSLY AFFECTING PHYSICAL CONDITION OF LAND at the time of its sale, such as a right of flowing the land by a mill-pond in actual existence upon it, does not constitute a breach of a general covenant against encumbrances. *Katz v. McCune*, 85.

CRIMINAL LAW.

1. MONOMANIAC ON ANY SUBJECT IS NOT GUILTY OF ANY CRIME, where he does an act criminal in nature, while under the influence of an insane impulse which controls his will and judgment. *Stevens v. State*, 634.

2. **INSANITY**—PERSON IS NOT GUILTY OF ANY CRIME THOUGH HE KILLS HUMAN BEING, if such killing is the offspring or product of mental disease in the slayer, of such a nature that he has not the power to adhere to the right, nor to avoid the wrong. *Id.*
3. **UN SOUNDNESS OF MIND IS QUESTION OF FACT TO BE DETERMINED BY JURY**, in criminal cases, as other facts are found. *Id.*
4. **STATE COURTS HAVE NO JURISDICTION TO PUNISH CRIMES** against the laws of the United States as such. *People v. Kinney*, 360.
5. **PERJURY COMMITTED BY SWEARING FALSELY BEFORE REGISTER** of the United States land-office, in a proceeding touching the public land, is an offense against the laws of the United States solely, and is not punishable in the state courts. *Id.*
6. **IN MURDER CASE, EVIDENCE OF DEFENDANT'S GOOD CHARACTER BY GENERAL REPUTATION CANNOT BE REBUTTED BY EVIDENCE OF PARTICULAR ACTS** of misconduct or crime, and that by rumors and reports in the country. Every man is presumed ready at all times to defend his general character, but not his individual acts. *McCarty v. People*, 542.
7. **ONE WHO SHOOTS AT ANOTHER IN FUN IS RESPONSIBLE FOR CONSEQUENCES OF HIS ACT.** The law implies malice from this reckless trifling with human life. *Collier v. State*, 449.
8. **THAT ONE WHO SHOT AT ANOTHER IN FUN, AND HIT HIM, APPEARED TO BE VERY SORRY**, may go to show want of express malice, but will not rebut the malice which the law implies from such recklessness. *Id.*
9. **INDICTMENT FOR ROBBERY MUST STATE THAT PROPERTY WAS TAKEN FROM PERSON OF ANOTHER**; to say that it was taken from him is insufficient. *Stegar v. State*, 472.
10. **PERSON IN ACTUAL POSSESSION OF MONEY HAS SUCH OWNERSHIP THEREOF** as makes it robbery to take it from his person without his consent. *Id.*
See EVIDENCE, 3.

CUSTOMS.

See COMMON CARRIERS, 6.

DAMAGES.

1. **DAMAGES EXCESSIVE**—EIGHT THOUSAND DOLLARS FOR LOSS OF INFANT'S RIGHT ARM ARE NOT. — Judgment on verdict for eight thousand dollars damages for loss of infant's right arm, in consequence of being run over by the train of a railroad company which failed to erect a fence as required by law, will not be reversed for excessive damages, there being nothing to show that the jury acted under improper influence or bias in the matter. *Schmidt v. Milwaukee etc. R'y Co.*, 158.
2. **IN TRESPASS FOR PLACING DIRT UPON PLAINTIFF'S LOT, HE IS ENTITLED** to nominal damages, although the lot was benefited thereby, but he cannot recover as damages what it would cost to remove the dirt. Whether the placing of the dirt on the lot was a benefit to it is for the jury to determine, with reference to the use for which the plaintiff intended the lot, if that be shown. *Murphy v. Fon du Lac*, 181.
3. **JURY ARE AT LIBERTY TO APPLY THEIR GENERAL KNOWLEDGE** in determining the question whether an increase of frontage is a benefit adding to the value of a lot. *Id.*

See AGENCY, 3; ASSUMPT, 5; BONDS; ESTOPPEL, 13; WAREHOUSEMEN.

DEBTOR AND CREDITOR.
See **ASSESSMENTS; COMPROMISE.**

DEEDS.

1. **IF TRUE OWNER CONVEYS PROPERTY BY ANY NAME**, the conveyance, as between the grantor and grantee, will transfer the title. *Fallon v. Kehes*, 347.
2. **CONVEYANCE OF LAND, EXECUTED BY OWNER IN HIS RIGHTFUL NAME**, though such name be different from that in which he acquired it, will, if duly recorded, operate as constructive notice of the sale and transfer of the title, and will take precedence of any subsequently recorded deed to the same land, executed in the name by which it was acquired. *Id.*
3. **ORDINARY QUITCLAIM DEED EXECUTED BY DEVISEE FOR LIFE**, with a power in him to sell the entire interest, conveys only his life estate, and does not amount to an execution of the power of sale. *Toole v. Ewing*, 179.
4. **DEED CAN BE ADMITTED TO RECORD** only upon certificate of proof or acknowledgment of an authorized court or officer. If not so admitted to record, the registration does not make it notice to the world. *Stimpson v. Montgomery*, 228.
5. **DEED DULY ACKNOWLEDGED AND LODGED FOR RECORD PASSES TITLE**, as between vendor and vendee, though not recorded because the tax was not paid thereon; and any subsequent vendee may pay the tax and fees, and cause it to be recorded. *Knight v. Whitman*, 652.
6. **CONDITIONAL LIMITATIONS IN DEEDS ARE VALID**. *Smith v. Smith*, 153.
7. **CONDITIONS AND LIMITATIONS IN DEEDS DISCUSSED, AND DISTINGUISHED FROM EACH OTHER**. *Id.*
8. **CONDITIONAL LIMITATION IS OF MIXED NATURE**, and partakes of a condition and a limitation. *Id.*
9. **CONDITIONAL LIMITATION OF WIFE'S ESTATE IN DEED TO HUSBAND AND WIFE**. — A deed granted land to a husband and wife, their heirs and assigns, forever, with a clause stating that it was made to the wife on condition that if she should not continue to live with her husband, having no good cause for a divorce, the land should vest in fee in the husband, his heirs and assigns, forever. The *habendum* clause was to the grantees, their heirs and assigns, forever. There was also a covenant of warranty. Held, that there was a valid conditional limitation of the wife's estate. *Id.*
10. **EXCEPTION IN CONVEYANCE IS PART OF THING GRANTED AND OF THING IN BEING**; while a reservation is of a thing not in being, — is not a part of the estate itself, but is created out of it. *Rick v. Zellsdorff*, 81.
11. **TIMBER REMAINS PROPERTY OF GRANTOR, WITH RIGHT IN SO MUCH OF SOIL as is necessary to sustain it**, when the timber itself is excepted in the conveyance. *Id.*
12. **RESERVATION IN DEED OF RIGHT TO CUT AND REMOVE SO MUCH TIMBER as the grantor may remove within a specified period does not except out of the estate granted the ownership of the timber**, but reserves to the grantor a mere right of cutting and removing, which terminates at the expiration of the period of limitation; and this is the legal effect of a clause in a deed "reserving the right to cut and remove all the pine timber or trees upon said premises, etc., and the right is hereby reserved by [the grantor] to enter upon said lands at any time within two years next succeeding the date of this instrument for the purpose of cutting and removing the trees and timber so reserved." *Id.*
13. **VOLUNTARY REDELIVERY, DESTRUCTION, OR CANCELLATION OF DEED CAN-NOT UNDER ANY CIRCUMSTANCES REINVEST the grantor with title to the**

premises conveyed by said deed, as against the acquired rights of a third person under such deed. This principle was applied to the following facts: A took a deed to land. It was not recorded, and was lost or destroyed. With A's consent, another deed was made to his son. A and son executed a mortgage in which A's wife did not join. A and his son died, leaving the mortgage unpaid. The mortgagee sought to foreclose. *Held*, that A's wife was entitled to one third of the land. *Sutton v. Jarvis*, 631.

14. **EQUITY WILL NOT PERMIT PERSON, AS AGAINST INNOCENT PURCHASER, TO ASSERT RIGHTS BY PAROL EVIDENCE** under a deed voluntarily redelivered to the grantor, destroyed or canceled. *Id.*
15. **POSSESSION OF LAND TAKEN UNDER UNRECORDED DEED IS NOTICE TO THIRD PERSONS** of the existence of such deed. *Id.*
16. **DEED WILL NOT BE SET ASIDE FOR MENTAL WEAKNESS OF GRANTOR**, in the absence of undue influence, unless such a degree be shown as rendered him incapable of understanding and protecting his own interests. The circumstance that his intellectual powers were somewhat impaired by age is not sufficient, if he still retained a full comprehension of the meaning, design, and effect of his acts. *Lindsey v. Lindsey*, 489.
17. **POSSESSION OF ONE ENTERING UPON PORTION OF TRACT OF LAND**, claiming the whole under a deed, no other party being in the adverse possession of any part of it, extends to the bounds of the deed. *Russell v. Harria*, 421.
18. **WHERE DEED REFERS TO DESCRIPTION IN ANOTHER DEED**, and such reference is free from ambiguity, and contains nothing inconsistent with whatever of specific description is contained in it, such deed must be construed to convey all the estate described in the deed to which such reference is made, and parol evidence cannot be admitted to show the intention of the parties, and to limit its extent by construction in a way which would violate any of its calls. *Hines v. Robinson*, 772.
19. **TWO DEEDS EXECUTED AND DELIVERED ON SAME DAY BY SAME GRANTOR** to different grantees, one conveying one parcel of land with an easement in another, and the other deed conveying the latter parcel, but reserving the easement, are to be construed together. *Knight v. Dyer*, 765.
20. **GRANTOR WHO HAS CONVEYED GOOD TITLE BY WARRANTY DEED MAY NEVERTHELESS SET UP AGAINST HIS GRANTEE**, or against those who hold his grantee's title, a title subsequently acquired by himself by disseisin of his original grantee, and those claiming under him. *Hines v. Robinson*, 772.
21. **THOUGH DEED OF LAND WITH UNRECORDED BOND TO RECONVEY CONSTITUTES MORTGAGE** only as between the parties, as to the public without notice it conveys the fee; and if the holder of the record title under it conveys an easement in the land, even without consideration, and the person to whom such conveyance is made conveys to a third person for a valuable consideration, neither grantee having any knowledge of the bond to reconvey, the latter grantee will acquire such title as the record gives him. *Knight v. Dyer*, 765.

See **BONA FIDE PURCHASERS; CORPORATIONS, 5; COVENANTS; EASEMENTS; EQUITY; ESTOPPEL; HUSBAND AND WIFE, 1, 2.**

EASEMENTS.

RIGHT TO EASEMENT IN LAND IS ACQUIRED BY DEED OF CONFIRMATION from the owner of the land, in which he confirms, acknowledges, and

grants the easement therein, to be used by the grantee, his heirs and assigns, without denial, obstruction, or hindrance. *Knight v. Dyer*, 765.

See COVENANTS, 6; WAYS.

EJECTMENT.

1. RECOVERY IN EJECTMENT ENTITLES PLAINTIFF TO POSSESSION OF PREMISES, together with crops growing thereon, unless he has recovered as mesne profits the rent for that year, in which case he cannot claim the crop. *Gardner v. Kersey*, 484.
2. RIGHT TO CROPS IN CASE OF EJECTMENT. — Where one who has recovered in ejectment has recovered rent for that year as mesne profits, he is not entitled to crops growing on the premises. He is entitled to possession, but must allow the tenant ingress and egress to gather and remove the crop. Where he has recovered rent for part of the year, he must divide the crop *pro rata* with the tenant. *Id.*
3. INJUNCTION. — Where one who has recovered in ejectment appropriates the crops growing upon the premises after having recovered rent for that year as mesne profits, he is liable for their value to the tenant, but the latter's remedy at law being thus complete, he is not entitled to an injunction against such conversion when threatened. *Id.*
4. WHERE, IN ACTION OF EJECTMENT, ATTORNEYS MAKE STIPULATION LIMITING ISSUES TO TITLE THEN HELD by the respective parties, a sheriff's deed to one of the parties, executed after the stipulation was made, is not admissible in evidence, though the deed is given upon a sheriff's sale made before the signing of the stipulation. *Bagley v. Ward*, 256.
5. TITLE ACQUIRED BY DEFENDANT THROUGH SHERIFF'S DEED EXECUTED AFTER COMMENCEMENT OF ACTION of ejectment can only be made available by supplemental answer. *Id.*

See ADVERSE POSSESSION, 6; IMPROVEMENTS.

EQUITY.

1. IN EQUITY, IF THERE IS MISJOINDER OF PARTIES PLAINTIFF, all the defendants may demur; but if the misjoinder is of parties defendant, those only can demur who are improperly joined. *Christian v. Crocker*, 223.
2. OBJECTION OF MISJOINDER OF PARTIES DEFENDANT in a bill is a merely personal privilege. *Id.*
3. OBJECTION THAT EQUITY HAS NO JURISDICTION, because there is an adequate remedy at law, comes too late after answer filed, unless it is in a case where equity could not entertain jurisdiction under any circumstances. *Magee v. Magee*, 571.
4. COURT OF EQUITY WILL NOT LEND ITS AID TO ENFORCE PERFORMANCE of an act which the law prohibits to be done. *Martin v. Zellerbach*, 365.
5. TO REMOVE CLOUD ON TITLE, EQUITY WILL DECREE CANCELLATION OF DEED OR OTHER INSTRUMENT WHICH HAS BECOME FUNCTUS OFFICIO. — Thus where a deed grants land to a husband and wife, with a clause stating that it is made to her on condition that if she shall not continue to live with him, having no good cause for a divorce, the land shall vest in fee in the husband, the wife's estate ceases and vests in the husband, after she deserts him, having no ground of divorce; and the deed, so far as it relates to the wife, constitutes such a cloud upon his title that equity will cancel it at his suit, and this notwithstanding he has obtained a decree of divorce from her for willful desertion. *Smith v. Smith*, 153.

6. **WHEN ONE OF TWO PARTIES MUST SUFFER**, the loss must be borne by him who contributed to bring about the state of things which caused the loss. *Coldwell v. Neil*, 738.

See INJUNCTIONS; MARRIAGE AND DIVORCE; MISTAKE.

ESTATES.

See DEEDS.

ESTATES OF DECEDENTS.

1. **CHILD WHO HAS RECEIVED ADVANCEMENT MUST ACCOUNT FOR IT** when he seeks to come in as a distributee, and the advancements must be estimated at their value at the time they were received, unless there was a value fixed at the time, by agreement. *Sims v. Sims*, 450.
2. **ADVANCEMENT MUST BE ACCOUNTED FOR AT ITS VALUE WHEN RECEIVED**, and its subsequent depreciation in value or destruction cannot be relieved against by the court. *Id.*
3. **ESTIMATED VALUE OF ADVANCEMENTS AND OF ESTATE MUST TAKE PLACE TWELVE MONTHS FROM ADMINISTRATION**, which is the time for the first distribution. *Id.*
4. **PROBATE COURT HAS EXCLUSIVE JURISDICTION TO ADJUST AND ENFORCE DEMANDS** for expenses of administration of the estates of decedents, among which are claims for services rendered and money expended, at the request of the administrator, for the benefit of the estate; and an action is not maintainable in the district court, against the administrator, which seeks to charge the estate with such expenses. *Gurnes v. Maloney*, 352.

See WILLS.

ESTOPPEL.

1. **ESTOPPEL MAY BE BY DEED, BY RECORD, OR BY MATTER IN PAIL**. The acts and admissions of a party may estop him from even speaking the truth, when in good conscience and honest dealing he ought not to be permitted to gainsay them. *Simpson v. Pearson*, 577.
2. **ESTOPPEL IN PAILS WILL CONCLUDE PARTY FROM DENYING HIS OWN ACTS OR ADMISSIONS**, which were expressly designed to influence, and which did influence, the conduct of another, when such denial will operate to the injury of the latter. The principle underlying this doctrine is, that it would be a fraud in a party to assert what his previous conduct and admissions have denied, when others have acted on the faith of that denial. *Id.*
3. **NO ONE CAN SET UP ANOTHER'S ACT OR DECLARATION AS GROUND OF ESTOPPEL**, unless he himself has been misled or deceived by such act or declaration, and unless he would be injured, if that other is permitted to gainsay or deny the truth of what he did. *Id.*
4. **ESTOPPELS OPERATE NEITHER IN FAVOR OF NOR AGAINST STRANGERS**; hence he can neither be bound by nor take advantage of an estoppel. This principle applies to all classes of estoppels. *Id.*
5. **HEIRS ARE NOT ESTOPPED BY DECREE AND PROCEEDINGS, IN PARTITION SUIT BETWEEN THEMSELVES**, from showing, in an action against them by the administrator of the person from whom they inherit, a title to land different from that shown in such partition suit. *Id.*

6. TRANSACTION WHICH IS VOID BECAUSE PROHIBITED BY LAW cannot be purged of its infirmity by means of an estoppel. *Martin v. Zellerbach*, 365.
7. DOCTRINE OF ESTOPPEL IN PAIN PROCEEDS WHOLLY ON THEORY that the party to be estopped has, by his declarations and conduct, misled another to his prejudice, so that it would be a fraud upon him to allow the true state of facts to be proved. *Id.*
8. IN ORDER THAT DECLARATIONS OR CONDUCT OF PARTIES SHALL OPERATE AS ESTOPPEL, in respect to title to real property, it must appear, — 1. That the party making the admissions, by his declarations or conduct, was apprised of the true state of his own title; 2. That he made the admission with the express intention to deceive, or with such careless or culpable negligence as to amount to constructive fraud; 3. That the other party was not only destitute of all knowledge of the true state of the title, but of all convenient or ready means of acquiring such knowledge by the use of ordinary diligence; and 4. That he relied directly upon such admission, and will be injured by allowing its truth to be disproved. *Id.*
9. JUDGMENT CREDITOR IS NOT ESTOPPED TO DENY DEBTOR'S TITLE to property sold under execution in satisfaction of his judgment. *Id.*
10. EQUITABLE ESTOPPEL — ACT IN PAIN. — The owner of a certificate of sale procured a patent, but by mistake it was made to his father instead of himself. He gave the patent to his father, and afterwards absented himself from the state for ten years, leaving his father in possession of the land, to deal with it as his own. *Held*, that the son was estopped from asserting an equitable title to the land as against a purchaser from the father, in good faith, for a valuable consideration. *Schnee v. Schnee*, 183.
11. ESTOPPEL BY MATTER OF RECORD MUST BE PLEADED. *Blood v. Marcuse*, 435.
12. ONE WHO FAILS TO DISCLOSE CERTIFICATE OF PURCHASE AT TAX SALE HELD BY HIM, on discharging other liens and encumbrances on the land, and who states that he had no other claims, will be estopped from setting up or relying on the tax deed procured thereunder, and the deed will be set aside as a cloud on title, whether or not the owner of the land knew that the taxes were unpaid for the year for which the land was sold; although it seems the holder of the tax deed is entitled to be repaid the sum advanced by him. *Davidson v. Follett*, 648.
13. AFFIDAVIT AS TO OWNERSHIP OF PROPERTY RAISES NO ESTOPPEL FROM SUING FOR DAMAGE TO IT WHEN. — An affidavit in replevin, made by a wife, stated that the property belonged to her husband. In an action afterwards brought by her for damage done to such property, it was objected that, by reason of such affidavit, she was estopped from maintaining the suit. *Held*, that although the affidavit was strong evidence to prove that the property belonged to her husband, yet it could not be considered as conclusive; that she might explain the affidavit as to the ownership of the property; and that it was for the jury to determine the sufficiency of such explanation. *Smydaker v. Broese*, 551.
14. JUDGMENT IN FAVOR OF ASSIGNEE OF NOTE UNDER INVALID ASSIGNMENT DOES NOT ESTOP the claimant of the proceeds of such judgment, under the rightful owner, unless it appears that the fact of the assignment was put in issue between debtor and assignee. *Blood v. Marcuse*, 435.

See WAREHOUSEMEN, 5.

EVIDENCE.

1. **EXCLUSION OF EVIDENCE IS NOT GROUND FOR REVERSAL**, unless, when it is offered, its object is stated with sufficient distinctness to enable the appellate court to see that material evidence was rejected, or unless a sufficient foundation for it is shown in the evidence already introduced. *Dreher v. Fitchburg*, 91.
2. **ADMISSIONS ARE WEAKEST KIND OF EVIDENCE**, and an instruction to this effect is not erroneous. But this does not imply that an admission deliberately made and clearly proved beyond mistake would not have very great inherent force as evidence. *Id.*
3. **DYING DECLARATIONS ARE ONLY ADMISSIBLE IN CASES OF HOMICIDE**, and then only when the declarations are of the circumstances attending the act producing the injury. *Wooten v. Wilkins*, 456.
4. **DYING DECLARATIONS OF WOMAN, WHO DIED IN CHILD-BIRTH**, that defendant in an action for her seduction was the father of her child, are not admissible in evidence against him. *Id.*
5. **ADMISSIONS, RIGHT TO WITHDRAW WRITTEN**.—Where a party to an action makes a written admission of facts, simply to save the other party the trouble and expense of getting up the testimony, if he discovers that the admission is not true, he may withdraw it, provided there remains sufficient time for the other party in which to prepare his case, and provided also that such party has not been injured by relying on such admission, as by the death of an important witness. *Wallace v. Matheuse*, 473.
6. **COURT WILL JUDICIALLY NOTICE** that in September, 1867, the civil state government of Arkansas was provisional, and that the commanders of the United States military forces, by acts of Congress and orders of the President, were then clothed with power and authority to arrest and imprison citizens who willfully violated the laws, regulations, and rules prescribed by the federal government. *Belden v. State*, 214.
See **COMMON CARRIERS**, 10; **PLEADING AND PRACTICE**; **WITNESSES**.

EXECUTIONS.

1. **ONLY PURPOSE OF EXECUTION IN RESPECT TO REAL ESTATE WHILE JUDGMENT LIEN SUBSISTS** is to enforce the lien by a sale of the property. *Bagley v. Ward*, 256.
2. **LANDS NOT SUBJECT TO JUDGMENT LIEN MAY BE LEVIED UPON** under an execution. *Id.*
3. **TO PRESERVE PRIORITY ACQUIRED BY JUDGMENT LIEN**, sale must be made during the statutory period of the lien. *Id.*
4. **COPY OF EXECUTION LEVIED ON REAL ESTATE, WITH LEVY INDORSED thereon**, need not be filed in recorder's office. *Id.*
5. **WHERE NO JUDGMENT OR ATTACHMENT LIENS EXIST, LEVY OPERATES UPON REAL PROPERTY** as it does upon personal property; that is, the execution first served has priority. *Id.*
6. **LEVY OF EXECUTION UPON REAL ESTATE, DURING PENDENCY OF JUDGMENT LIEN**, neither extends such lien nor creates a new lien. *Id.*
7. **IF EXECUTION IS LEVIED ON REAL ESTATE, WHILE JUDGMENT LIEN SUBSISTS**, and is returned without a sale, and after the judgment lien expires another execution is issued and levied, and a sale is made, such sale takes effect by relation at the time when the second execution was levied. *Id.*

6. **LEVY OF EXECUTION AND SALE OF REAL PROPERTY DURING EXISTENCE OF PRELIMINARY INJUNCTION** restraining the same renders the sale voidable, and the execution and sale may, upon proper proceedings taken, be set aside. But such a sale is not void, and a deed made under it confers a valid title. *Id.*
9. **LEVY OF EXECUTION HAS NO FURTHER EFFECT THAN TO FIX DATE** of commencement of the sheriff's title as against all persons who are not parties to the writ. *Blood v. Light*, 441.
10. **PURCHASER AT SHERIFF'S SALE, TO SUSTAIN HIS TITLE, IS ONLY REQUIRED TO SHOW** a sale and the authority of the officer to make it. The deed proves the sale, and the judgment and execution are proof of the authority of the officer to make the sale. *Id.*
11. **VALIDITY OF TITLE OF PURCHASER AT SHERIFF'S SALE IS UNAFFECTED** by failure of the officer to make the levy in the mode prescribed by statute, for his power to sell comes from the judgment and execution, and is not to be measured by his proceedings under the writ. *Id.*
12. **ERRONEOUS RECITAL OF EXECUTION IN SHERIFF'S DEED WILL NOT AFFECT** the validity of the deed if the sheriff in fact had authority to sell. *Id.*
13. **PRESUMPTION IN FAVOR OF VALIDITY OF ANCIENT FL. FA.** — To support a sale of land in Lee County, a *fl. fa.* issued by a justice's court of Morgan County was introduced. It was backed on the 28th of October, 1831, by another justice, but for what county does not appear, and was levied the next day upon land in Lee County by a constable of that county. *Held*, that under the circumstances it would be presumed that the justice was a justice of Lee County. *Thomas v. Malcom*, 459.
14. **ORDER SETTING ASIDE LEVY UPON EXECUTION IS PROPERLY GRANTED, ON GROUND** that the execution was not subscribed by the party issuing it, or his attorney, as required by the statute, this objection being distinctly specified in the affidavit, a copy of which was served, with a notice of the motion. And the fact that the execution was properly subscribed after levy made and notice of motion served, constitutes no ground for denying the motion. *Bonesteel v. Orvis*, 201.
15. **EXECUTION WHICH DIRECTS LEVY OF MORE MONEY THAN JUDGMENT CALLS FOR** is voidable merely, and not void. *Hunt v. Loucks*, 404.
16. **EXECUTION DIRECTING LEVY OF MORE MONEY THAN JUDGMENT CALLS FOR** will not be set aside, but will be amended to agree with the judgment, upon application of the parties or either of them. *Id.*
17. **SALE UNDER VOIDABLE EXECUTION TO BONA FIDE PURCHASER IS VALID**, although the execution be afterwards set aside; but a sale under a void execution is absolutely void, and will pass no title, even to a *bona fide* purchaser. *Id.*
18. **WHETHER PARTY TO EXECUTION CAN BE BONA FIDE PURCHASER, quære.** *Id.*
19. **EXECUTIONS ARE NOT VOID THAT HAVE BEEN ISSUED ACCORDING TO ESTABLISHED COURSE** of practice, and are not so erroneous that they cannot be amended. *Id.*
20. **COMMON-LAW RULES AS TO VALIDITY OF JUDICIAL SALES ARE NOT CHANGED** by section 237 of the California Practice Act, concerning rights of purchasers who have been evicted. That section merely guards against mischievous consequences in certain cases, by affording a remedy which the common law did not. *Id.*
21. **EXECUTION NOT UNDER SEAL, ISSUED FROM COURT WHICH HAS BEEN ABOLISHED, OR UPON A VOID JUDGMENT, OR UPON A JUDGMENT AGAINST AN**

- administrator, or upon the death of the judgment debtor, or after an appeal and stay, are instances of executions which are probably void. *Id.*
22. ERRONEOUS OR VOIDABLE EXECUTIONS CANNOT BE COLLATERALLY ATTACKED. *Id.*
23. EXECUTION IS NOT IRREGULAR WHICH CAUSES FOR AMOUNT OF JUDGMENT, AND COSTS of an appeal therefrom. *Id.*
24. PURCHASER'S TITLE AT SALE UNDER EXECUTION DOES NOT DEPEND UPON OFFICER'S RETURN for its validity, and is not affected by the fact that the return fails to show a legal or any levy. *Id.*
25. OBJECTION THAT LAND WAS NOT SOLD IN SEPARATE PARCELS AT EXECUTION SALE CANNOT BE TAKEN AFTER TIME FOR REDEMPTION HAS EXPIRED, either by the judgment debtor himself, by one holding a mortgage on the land, or by a purchaser under the foreclosure of such mortgage. *Raymond v. Holborn*, 105.
26. PURCHASER AT EXECUTION SALE HAS RIGHT TO REDEEM BY PAYING PRIOR MORTGAGE, or his equitable proportion thereof, where the lands sold on execution are a part only of those covered by the mortgage sale. *Id.*
27. PRODUCTION OF PAPERS MENTIONED IN STATUTE AS NECESSARY TO ENABLE PARTY TO REDEEM may be waived by a purchaser at an execution sale, as between himself and a redemptioner; and a creditor not claiming to be a redemptioner, but proceeding to sell the property under his own execution, has no right to complain of such waiver. *Bagley v. Ward*, 256.
28. REDEMPTION FROM SHERIFF'S SALE IS VIRTUALLY TRANSFER OF CERTIFICATE OF SALE, and if a party, being entitled to redeem, effects the redemption to the satisfaction of the purchaser, the sheriff's deed to him passes the same title that it would have passed to the purchaser had it been executed to the latter without redemption. *Id.*
29. IF PURCHASER AT SHERIFF'S SALE ACKNOWLEDGE IN WRITING REDEMPTION by one entitled by law to redeem, the sheriff has authority to execute to him a deed, without inquiry as to the papers produced to the purchaser. *Id.*
30. AS AGAINST MERE TRESPASSER, STRICT PROOF OF ISSUANCE OF EXECUTION is not required to be made by a purchaser at sheriff's sale who has been in possession for a long period of time claiming title under the deed, and especially where neither the defendant in the judgment, nor any one claiming under him, has made any claim adverse to the plaintiff. And when it is shown that there was a judgment of a proper date, upon which an execution might have issued, a charge by the clerk for issuing an execution, a sale by the sheriff, and a certificate of sale purporting to have been made in pursuance of an execution, and that after the expiration of six months from the sale the sheriff executed a deed in which the judgment and execution are recited, — these facts are sufficient to raise the presumption of the existence of an execution after the lapse of sixteen years, although none could be found among the records of the court. *Russell v. Harris*, 421.

See EMBODIMENT, 5; EXEMPTIONS; HUSBAND AND WIFE, 4-6; JUDICIAL SALES; PROCESS.

EXECUTORS AND ADMINISTRATORS.

1. WHERE CHARGES IN FAVOR OF ADMINISTRATOR IN HIS ANNUAL ACCOUNT HAVE BEEN RESTRICTED, by reason of his failure to produce the necessary

vouchers required by statute, he may include the charges in a subsequent account, and have them allowed on production of the vouchers. *Walls v. Wagner*, 290.

2. SETTLEMENT OF ANNUAL ACCOUNT OF ADMINISTRATOR IS NOT CONCLUSIVE, even as against the heirs, legatees, and creditors, except as to such items as are included in the account, and actually passed upon by the probate court. *Id.*
3. FUNDS IN HANDS OF ADMINISTRATOR, NOT NEEDED TO PAY EXPENSES OF FUNERAL and last sickness of the intestate, and the allowance to his family, should be applied to the payment of debts, upon an order obtained by the administrator at his next annual settlement. *Id.*
4. ADMINISTRATOR WILL BE CHARGED WITH INTEREST, where he uses the funds of the estate in his private business, or retains them in his hands for an unreasonable length of time, to the prejudice of the heirs and creditors. He must prosecute the settlement of the estate with all reasonable diligence. *Id.*
5. UNDER LAWS OF CALIFORNIA, ADMINISTRATOR IS VESTED with right to possession of the real estate of his intestate, as well as the personal, and his duties and liabilities in respect thereto are of the same general character. *Id.*
6. ADMINISTRATOR WHO OCCUPIES AND USES REAL ESTATE of his intestate becomes the tenant of the estate, and liable for the value of its use and occupation; and if he makes a profit, he is liable for that also. If he sustains a loss, the loss is his; he must, in any event, account for the rental value of the land. *Id.*
7. ADMINISTRATOR CANNOT BE CHARGED WITH RENTAL VALUE of land of the estate after a foreclosure sale of the premises by the sheriff. From that time, the purchaser at the sale is entitled to the value of the use and occupation. *Id.*
8. EXECUTOR OR ADMINISTRATOR, BY MAKING OR INDORSING NOTE in his official capacity, cannot thereby bind the estate, but is himself responsible for the amount, and the holder need not allege that the executor or administrator exceeded his powers or functions, in order to maintain an action against him personally. *Livingston v. Gausson*, 731.
9. WHERE EXECUTOR OR ADMINISTRATOR MAKES NOTE in his official capacity, the presumption of law is against him, and the burden of proof on him to allege and prove that he is not individually liable. *Id.*
10. HOLDER OF NEGOTIABLE INSTRUMENT, made or indorsed by an executor as such, may sue such party individually thereon, leaving the latter under certain circumstances to set up the defense that he is not personally liable. *Id.*
11. EXECUTOR'S CONTROL DOES NOT TERMINATE WITH POSSESSION OF TENANT FOR LIFE, but after her death he may take possession of the estate, with its increase, and administer it in accordance with the will, and for this purpose the court of ordinary has jurisdiction. *Smith v. Granberry*, 464.
12. PURCHASE BY EXECUTOR AT HIS OWN SALE IS NOT VOID, BUT VOIDABLE AT ELECTION of those interested, within a reasonable time, and his possession under such purchase by himself or tenant becomes adverse from its date. *Id.*
13. TENANT OF EXECUTOR WHO PURCHASED AT HIS OWN SALE, and is in possession under such purchase, cannot change his landlord by attorning to the executor's successor in the trust, and thus rob the executor's possession of its adverse character. *Id.*

14. **LANDLORD AND TENANT — ESTATES OF DECEDENTS.** — Where an executor purchased land at his own sale, which he leased to a tenant, and then settled upon his wife by marriage settlement, upon his death his tenant becomes the tenant of his wife, and the administrator *de bonis non* of the estate cannot interfere in any way with a proceeding by her against the tenant for holding over, as such proceeding does not in any manner prevent his bringing the proper action for the recovery of the land. *Id.*
15. **SECOND JUDGMENT FOR SALE OF LAND FOR PAYMENT OF DEBTS AND FOR DISTRIBUTION,** entered after the rendition of a former judgment for the same purpose, but prescribing different terms of sale, is void when rendered as an original judgment, and not upon suggestion or supplemental pleadings to modify or alter the first judgment; and a sale made under a combination of the terms of the two judgments is void. *Beitel v. Beitel*, 655.
16. **COURT, HAVING RENDERED JUDGMENT ORDERING SALE OF LANDS OF DECEDENT,** cannot, after the adjournment of that term, render another and different judgment upon the same record without further pleadings, suggestions, or evidence. *Id.*
17. **VOID SALE OF LANDS OF DECEDENT CANNOT BE VALIDATED** by confirmation of the commissioner's report. *Id.*

See PARTNERSHIP, 10, 11.

EXEMPTIONS.

1. **EXEMPTED ARTICLES ARE PROPERLY SET APART FOR BENEFIT OF FAMILY** consisting of the debtor, who was an unmarried *bona fide* housekeeper, an unmarried sister, and two brothers, all under twenty-one years of age, living with him, whose parents were both dead, and whose support and education he had assumed, they being without means. And the court properly refused to allow provision to be made for a brother over twenty-one years of age, and for servants. *McMurray v. Shuk*, 662.
2. **EXEMPTION LAWS ARE NOT INTENDED TO PROVIDE FOR SUPPORT OF OFFERATIVES** hired by debtor to prosecute his business, either in cultivating a farm, or in the performance of other service. *Id.*
3. **EXEMPTION STATUTES APPLY ONLY TO CASE OF HOUSEKEEPER WITH FAMILY;** and the family contemplated are those who reside with or compose the household of the debtor. *Seaton v. Marshall*, 683.
4. **HORSE OF PRACTICING PHYSICIAN IS EXEMPT FROM EXECUTION,** where he was a widower with two daughters of tender age, whom he kept in the care of his mother, providing for them, and sending one of them to school from his mother's house, while he himself occupied a single room, about one mile distant, as an office and dwelling, without servants or other family than his children, who were sometimes with him at his office, where he lodged, cooked, and ate his meals; for the children, though for the time being in the immediate care of his mother, were domiciled with him, and he was therefore a housekeeper having a family residing with him. *Id.*
5. **ANY JUDGMENT DEBTOR MAY CLAIM ARTICLES EXEMPT FROM SALE ON EXECUTION,** under subdivision 7, section 31, chapter 134, of the Revised Statutes of Wisconsin of 1858, such as animals, food, farming utensils, etc. The exemption is not limited to farmers only. *Knapp v. Bartlett*, 109.
6. **ONE CANNOT DOUBLE HIS EXEMPTION FROM SALE ON EXECUTION,** under subdivision 9, section 31, chapter 134, of the Revised Statutes of Wisconsin.

sin of 1858, which exempts "the tools and implements, or stock in trade, of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business," by carrying on the business both of a mechanic and a miner at the same time. *Id.*

7. STALLION IS NOT EXEMPT FROM EXECUTION WHEN KEPT FOR SERVICE OF MARES only, and not used as a work-horse. *Roberts v. Adams*, 413.
8. EXEMPTION FROM EXECUTION OF OXEN, HORSES, OR MULES BELONGING TO FARMER is intended to apply to such animals only as are suitable and intended for ordinary work conducted on a farm. *Id.*

EXPERTS.

See WITNESSES.

FRAUDULENT CONVEYANCES.

1. CONVEYANCE WITHOUT CONSIDERATION, MADE BY DEBTOR FOR PURPOSE OF DEFRAUDING HIS CREDITORS, may be avoided by the creditors, whether the grantee was aware of the fraudulent purpose and actively aided it or not. He is not a purchaser in good faith. *Lee v. Figg*, 271.
2. HUSBAND'S CONVEYANCE OF EXEMPT HOMESTEAD TO HIS WIFE IS NOT FRAUDULENT AS TO HIS CREDITORS. *Pike v. Miles*, 148.
3. SUBSEQUENT CREDITORS CANNOT IMPEACH HUSBAND'S VOLUNTARY SETTLEMENT ON WIFE of land other than such as was exempt, if such settlement was not unreasonable in its character in view of the property and situation of the husband at the time, and there was in fact no fraudulent intent. *Id.*
4. CONVEYANCE AS TO EXCESS NOT FRAUDULENT AS AGAINST SUBSEQUENT CREDITORS WHEN. — Where the whole value of a homestead conveyed by a husband to his wife was forty thousand dollars, and the homestead contained land, in excess of the amount exempt by law, worth five thousand dollars, and the husband was worth seventy-five thousand dollars, over and above his debts, at the time of the conveyance, it was held that the conveyance, as to such excess, was not fraudulent as against subsequent creditors. *Id.*
5. REAL INQUIRY IN CONVEYANCE ALLEGED TO BE FRAUDULENT AS AGAINST SUBSEQUENT CREDITORS is not whether the grantor was indebted, but whether he had ample and abundant means to satisfy all his debts after the conveyance. *Id.*
6. EVIDENCE INADMISSIBLE WITHOUT SUPPLEMENTAL COMPLAINT TO SUPPORT IT. — In an action to set aside a conveyance of land from husband to wife as fraudulent, evidence on the plaintiff's part that a mortgage had been executed by the husband and wife on said land after the commencement of the suit, and that the money raised by such mortgage was invested in other real estate in the wife's name, was held to be inadmissible without a supplemental complaint, setting up the facts and asking appropriate relief against such other real estate. *Id.*
7. RESULTING TRUST RAISED BY FRAUDULENT CONVEYANCE, AND CREDITOR'S REMEDY. — If real estate is conveyed to one person for a valuable consideration, which is paid by another, for the purpose of defrauding the creditors of the latter, such a creditor may, under the code, have a complete remedy in one action. A judgment may be obtained against the debtor, and the real estate in question be subjected to the payment of the judgment. *Lindley v. Cross*, 610.

See HUSBAND AND WIFE, 4-6.

GAMING.

1. ONE WHO TRAINS HORSE FOR RACE, ON WHICH MONEY IS BET, CANNOT RECOVER FOR HIS SERVICES, whether the race is run or not, as such services are in aid of a gaming transaction, which a horse-race is, and which is in violation of law. *Mosher v. Griffin*, 541.
2. HORSE-TRAINER MAY RECOVER MONEY LAID OUT AND EXPENDED FOR FEED AND SHOES for horse, which he is fitting for a race, on which money is bet; for, whether the race is run or not, it is necessary that the animal should be fed and shod, and such items are not necessarily a part of the gaming transaction. *Id.*

GROWING CROPS.

See EJECTMENT, 1-3; STATUTE OF FRAUDS.

HOMESTEADS.

1. PARTY HAVING ACQUIRED HOMESTEAD RIGHT IN TRACT OF LAND, WHO IS EVICTED FROM PART THEREOF on which he lived, may move to the other part of such tract, and hold it as a homestead. *Spencer v. Geismann*, 242.
2. PARTY HAVING NAKED POSSESSION ONLY OF TRACT OF LAND MAY ACQUIRE HOMESTEAD RIGHT therein as to everybody but the true owner, and such homestead right is exempt from forced sale on execution, and cannot be affected, except by a voluntary conveyance, or relinquishment in the mode prescribed by the statute. And the fact that the claimant, after the attaching of his homestead right, acquires the true title from a stranger does not affect his right. *Id.*
3. HOMESTEAD RIGHT DOES NOT DEPEND UPON CHARACTER OF TITLE held by the claimant thereof. The protection extends to whatever title he may have. *Id.*
4. HOMESTEAD EXEMPTION APPLYING TO "ALL DEBTS AND LIABILITIES CREATED OR INCURRED AFTER" a date named, does not apply to a judgment recovered after that date in an action commenced before it, even though the judgment was recovered on an appeal taken after it; nor does it apply to the costs, which are merely incidents, and must be governed by the laws applicable to the debt or liability out of which they grow. *Knight v. Whitman*, 652.
5. PURCHASE-MONEY ADVANCED BY THIRD PERSON WHEN LIEN ON HOMESTEAD. — Where a party advances the purchase-money for a homestead occupied by the vendee, upon his promise to execute a mortgage to secure the repayment of such money when he obtains a deed, and he afterwards refuses to do so, the purchase-money so advanced becomes a lien against the homestead, and may be enforced by the person advancing the money, and against it the vendee cannot maintain a homestead right. *Magee v. Magee*, 571.
6. HUSBAND CANNOT SUE ALONE TO ENFORCE HIS WIFE'S RIGHT TO HOMESTEAD, by seeking to avoid a release thereof executed by her, but she should join with him. *Eyster v. Hathaway*, 537.
7. CERTIFICATE OF ACKNOWLEDGMENT TO MORTGAGE, RECITING THAT WIFE RELEASED HER HOMESTEAD RIGHT, MAY BE IMPEACHED for fraud, duress, or undue influence, it seems, on a bill in equity filed for that purpose, or, perhaps, by way of defense to a suit to enforce the mortgage. *Id.*
8. MONEY BORROWED TO PURCHASE LAND IS NOT PURCHASE-MONEY, within the meaning of the Illinois statute declaring that the homestead right

should not be claimed against a debt due for the purchase-money. The statute only applies to persons occupying the relation of vendor and vendee. *Id.*

See FRAUDULENT CONVEYANCES, 2-4.

HOMICIDE.

See CRIMINAL LAW, 6-8.

HUSBAND AND WIFE.

1. DEED TO HUSBAND AND WIFE DOES NOT INVEST THEM WITH SEPARATE MOINTIES OF LAND SO CONVEYED; but each thereby becomes seised of it as an entirety, with the right of survivorship, and the husband at his death would leave no estate which could be subjected to the payment of his debts, or which would descend to his heirs. Husband and wife are considered one person in law. *Simpson v. Pearson*, 577.
 2. IN CONVEYANCE OF LAND TO HUSBAND AND WIFE, THEY ARE BOTH SEISED, DURING THEIR JOINT LIVES, OF ENTIRETY. Neither of them can alien so as to bind the other, and the survivor takes the whole estate. *Smith v. Smith*, 153.
 3. WIFE MAY, UNDER PROPER CIRCUMSTANCES, BE HELD AS INVOLUNTARY TRUSTEE OF HER HUSBAND. *Lindley v. Cross*, 610.
 4. WIFE MAY CULTIVATE LAND OWNED BY HER AS HER SEPARATE ESTATE, by means of the labor of her husband and their minor children, without divesting herself of the legal title to the products, so as to subject them to levy under an execution against the husband. *Fuller v. Alden*, 178.
 5. EMPLOYMENT OF HUSBAND BY WIFE TO CULTIVATE HER LAND IS NOT OF ITSELF PROOF of an arrangement to defraud his creditors. *Id.*
 6. WIFE'S MONEY DOES NOT BECOME PROPERTY OF HUSBAND when she places it in his hands to be invested for her. *Id.*
 7. WIFE IS NOT PROPER PARTY TO ACTION FOR RECOVERY OF MONEY loaned to her to pay for lot of ground, the deed to which was executed to her, but which became common property, and the purchase of which was ratified by the husband. *Althof v. Conheim*, 363.
 8. HUSBAND RATIFIES ACT OF WIFE IN BORROWING MONEY to purchase lot of ground by using and occupying the ground, and by selling a portion of it, and applying the proceeds to his own use; and he is responsible for the repayment of the money so borrowed. *Id.*
 9. PRESUMPTION IS, THAT ALL PROPERTY ACQUIRED DURING MARRIAGE is common property, unless the contrary is shown. *Id.*
- See FRAUDULENT CONVEYANCES, 2-6; HOMESTEADS, 6-8; MARRIED WOMEN; WITNESSES, 2.

IMPROVEMENTS.

IMPROVEMENTS. — In action for mesne profits against *bona fide* possessor, under claim of right, he should be allowed for improvements made by him to the extent that they have increased the value of the premises, and he will not be restricted to the value of the improvements themselves. *Thomas v. Malcom*, 459.

INFANCY.

See NEGLIGENCE, 8, 9; RAILROADS, 5, 6.

INJUNCTIONS.

ALLEGATION BY COMPLAINANT, IN BILL FOR INJUNCTION, THAT CERTAIN FACT IS MATTER OF RECORD, does not entitle him to the injunction, unless the allegation is sustained by the record, although it is not denied by the defendant, who pleads that he does not know the facts. *Gardner v. Kerecy*, 484.

See EJECTMENT, 3; TAXATION, 2.

INSANITY.

See CRIMINAL LAW, 1-3; WILLS, 9-14.

INSURANCE.

1. **PAROL CONTRACT OF INSURANCE WAS VALID AT COMMON LAW.** *Northwestern I. Co. v. Etna Ins. Co.*, 145. .
2. **PAROL CONTRACT OF MARINE INSURANCE IS VALID**, and an action can be maintained thereon. *Id.*
3. **OVERVALUATION OF PROPERTY IN APPLICATION FOR INSURANCE WILL NOT AVOID POLICY**, where the policy contains no condition to that effect, and where the agent of the insurance company knows or can judge of the value of the property, and accepts the application without objection; although an overvaluation is a circumstance which may be considered, in connection with others, in determining whether the insured destroyed the property for the purpose of defrauding the company, where that is relied upon as a defense. *Insurance Company of N. A. v. McDowell*, 497.
4. **CONDITION OF POLICY OF INSURANCE THAT NOTICE OF APPLICATION SHOULD BE SENT TO SECRETARY OF COMPANY**, is shown to have been sufficiently complied with where the application is indorsed, "Authorized November 5, 1866, at four per cent"; and, at all events, the company is estopped from raising an objection on that ground, where it recognizes the validity of the policy by receiving the premiums, and sending an agent to investigate the loss. *Id.*
5. **CONDITION OF POLICY REQUIRING CONSENT TO EFFECT OTHER INSURANCE TO BE INDORSED THEREON**, is sufficiently complied with, where it is shown that the insurance was effected with the same persons, as agents for the different companies, and that they notified the companies of the fact, and made an entry in the objecting company's book that other policies were applied for and risks taken. *Id.*
6. **CONDITION OF POLICY OF INSURANCE REQUIRING NOTICE TO BE GIVEN COMPANY OF ENCUMBRANCES ON PROPERTY INSURED**, is sufficiently complied with, where it is shown that its agents had notice thereof, and indorsed on the policy that the loss, if any, would be paid to the persons holding the encumbrances. *Id.*
7. **INCREASE OF HAZARD ONLY SUSPENDS POLICY OF INSURANCE** while it continues, and the liability of the company is restored when it terminates. *Id.*
8. **NOTICE TO INSURANCE COMPANY OF LOSS IS SUFFICIENT**, where it is such notice as induces the company to send its agents to the place to investigate the loss; and, at all events, where the notice is promptly given to the company's local agents. *Id.*
9. **SUIT ON POLICY OF INSURANCE IS NOT PREMATURELY BROUGHT**, where the policy provides that the company shall have sixty days after proof of loss, within which to pay the amount of the insurance, and the suit is brought within the prescribed period. *Id.*

10. **INSURANCE COMPANY WAIVES OBJECTIONS TO SUFFICIENCY OF PROOFS OF LOSS** by retaining the proofs, without pointing out specific objections to them. *Id.*
11. **VARIANCE BETWEEN ALLEGATIONS AND PROOF DOES NOT EXIST** where the declaration avers that a contract was made by a certain company, and the evidence shows it was made by the president and directors of the company. The contract is stated according to its legal effect. *Id.*
12. **CONDITION OF POLICY OF INSURANCE NOT TO ALLOW SMOKING IN PREMISES INSURED** is only an undertaking on the part of the insured that it shall not be done with his consent, and that he will use reasonable diligence to prevent it. *Id.*
13. **CONDITION OF POLICY OF INSURANCE REQUIRES SUBSTANTIAL COMPLIANCE** simply. *Id.*
14. **CONDITION AVOIDING POLICY OF INSURANCE FOR OMISSION OF INSURED** to mention existence of wooden building in close proximity to the building insured, is waived by a subsequent adjustment of the loss, and a valid new promise to pay by the company, with a knowledge of the facts. *Farmers' & M. I. Co. v. Chemut*, 492.
15. **PROVISION IN POLICY OF INSURANCE REQUIRING SUIT TO BE BROUGHT WITHIN ONE YEAR AFTER LOSS IS WAIVED** by an adjustment of the loss, and a valid new promise to pay by the company, upon which the insured relies. *Id.*
16. **CONDITION IN INSURANCE POLICY THAT COMPANY WILL NOT BE LIABLE** "for any loss or damage to goods contained in the show-window, when the loss or damage is caused by the light in the window, nor shall the company be liable for loss by theft," applies to theft from the show-windows, and not to theft committed in the necessary removal of goods to save them from impending conflagration. *Leiber v. Liverpool etc. Ins. Co.*, 695.
17. **FIRE INSURANCE POLICY COVERS LOSS BY THEFT IN NECESSARY AND PRUDENT REMOVAL OF GOODS** to save them from impending destruction from a fire in an adjoining building. *Id.*
18. **REMOVAL OF GOODS IS PROPER, WHEN ADJOINING TENEMENT IS BEING CONSUMED**, though in fact the store, where the goods were, escaped destruction and even injury. The inquiry should be, What was prudent and seemingly required on the part of the insured from the impending peril at the time of the removal? *Id.*
19. **DEMAND BY AGENT OF INSURANCE COMPANY UPON INSURED TO REMOVE HIS GOODS**, made during a fire in an adjoining building, though it may not fix the liability of the insurer for loss by theft during the removal, as it may have been outside of the agency, is, nevertheless, a powerful and significant fact to establish the propriety of the removal. *Id.*
20. **NOTICE OF PREVIOUS INSURANCE NEED NOT BE IN WRITING**, where the condition in the policy does not require it, though it prescribes that the assent of the company shall be in writing. *Kenton Ins. Co. v. Shea*, 676.
21. **DELIVERY OF WRITTEN POLICY AFTER LEGAL PAROL NOTICE OF PRIOR INSURANCE** constitutes a written assent to such prior insurance, without the unnecessary act of assenting thereto by another writing. *Id.*
22. **NOTICE OF PRIOR INSURANCE MAY BE ESTABLISHED BY PAROL**, where the policy does not require it to be in writing. *Id.*
23. **NOTICE OF PRIOR INSURANCE SUFFICIENTLY APPEARS**, in case of a policy not requiring it to be in writing, where the assured applied for addi-

tional insurance to the same agent who had made the existing insurance, and upon the same day; and he agreed to the further insurance, and that it should be placed with the other company for which he was agent, and made out and placed his own signature to the policy, and caused it to be delivered the next day; and then, in his usual course of business, notified his constituent of this additional insurance, and of the prior one, which was never disapproved by it, though this was sixty-nine days before the loss occurred. *Id.*

24. REQUIREMENT THAT ASSENT TO PRIOR INSURANCE SHALL BE INDORSED upon the policy, or otherwise appear by writing, may be waived. *Id.*
25. PECULIAR AND PRIVATE INSTRUCTION GIVEN TO AGENT OF INSURANCE COMPANY, and not made public, will not justify a refusal by the company to pay the policy. *Id.*
26. INSURANCE COMPANIES ARE BOUND FOR ACTS OF AGENTS not prohibited by their charters, and within the limits which may reasonably be presumed by the public, from the character of the business and the general manner of transacting it. *Id.*
27. AUTHORITY OF AGENTS OF INSURANCE COMPANIES TO BIND COMPANIES IS DETERMINED by the power they are held out by the companies to the public as possessing, and not by written instruments of appointment, of which the public could have no knowledge. *Farmers' & M. I. Co. v. Cheesnut*, 492.
28. ONE WHO NEGOTIATES FOR POLICIES OF INSURANCE for a commission paid by the company is an agent of the company, within the statute of Indiana requiring such agents to comply with prescribed conditions in order that the company may sue on its contracts, though he has no authority to bind the company by contracts. *Ford v. Buckeye State I. Co.*, 663.
29. CONTRACT OF INSURANCE IS RECOUNTED AT PLACE WHERE LAST ACT IS DONE which is necessary to complete the transaction and bind both parties. This act may be the issuance of the policy and transmission of it by mail; but where something further remains to be done in another state, as the approval and receipt of premium notes by an agent in that state, and a delivery of the policy by him in the same place, that state will be the place of the contract, and not the state where the policy was issued. *Id.*
30. PREMIUM NOTES GIVEN FOR POLICY OF INSURANCE WHICH IS NOT ENFORCEABLE in the state where the contract of insurance is made are not enforceable as between the parties in another state. *Id.*

INTERVENTION.

See ATTACHMENTS, 7, 8.

JUDGMENTS.

1. JUDGMENT RECOVERED BY CREDITOR ON NOTE GIVEN AS COLLATERAL SECURITY against the parties thereto, including the debtor as indorser, will not of itself bar an action on the original debt, nor will payment thereof by the debtor operate as a satisfaction of the original debt beyond the amount paid, unless it was so understood or agreed. *Burheimer v. Hart*, 641.
2. JUDGMENT ENTERED BY MISTAKE OF CLERK FOR SMALLER AMOUNT THAN ACTUALLY DUE MAY BE CORRECTED by an equitable proceeding, where the mistake was not discovered until after the period allowed by the statute in which to correct such errors on motion had expired, although

- the case was appealed to the supreme court, where the judgment was affirmed on motion, because the appeal was not perfected. *Partridge v. Harrow*, 643.
3. JUDGMENT BY CONFESSION ENTERED IN OPEN COURT, AND REGULARLY SIGNED BY JUDGE, is not a nullity on its face because of defects in the statement of the facts out of which the indebtedness arose. If the court had jurisdiction of the subject-matter and of the parties, however irregular or erroneous it may be, it cannot be called in question in a collateral proceeding. It can only be attacked by the creditors of the defendant, who are defrauded thereby, and in a direct proceeding for that purpose. *Lee v. Figg*, 271.
 4. JUDGMENT WILL BE UPHOLD BY EVERY REASONABLE INTENDMENT. — Where recovery is had in ejectment upon four different demises, and one of the lessors was dead at the time, the law will presume that the recovery was had upon the demises of the remaining three. *Gardner v. Kersey*, 484.
 5. UPON APPEAL, ALL PRESUMPTIONS ARE IN FAVOR OF JUDGMENT. If, therefore, a demurrer, on the ground that the action is barred by the statute of limitations, has been sustained, and the transcript fails to show when the action was commenced, it will be presumed that it was not commenced until after the statute had run. *Miles v. Thorn*, 384.
 6. JUDGMENT APPEALED FROM WILL BE AVOIDED and annulled if erroneous, and the judgment which should have been given will be rendered. *Chapman v. New Orleans etc. R. R. Co.*, 722.
 7. TO REJECT DEMAND AS RES JUDICATA, the thing demanded must be the same as in the first suit, and must be founded on the same cause of action, and the contest must be between the same parties, acting in the same qualities. *Stocomb v. De Lazard*, 740.
 8. ACQUIESCENCE IN JUDGMENT, HOWEVER MANIFESTED, constitutes what is decided by that judgment, *res judicata*. *Id.*
 9. IT IS IMMATERIAL HOW JUDGMENT BECOMES RES JUDICATA; what is decided by such judgment must be held to be legally true between the parties. Whether such judgment will bar another action between the same parties depends upon whether the thing demanded in the new suit is the same and founded on the same cause of action as the suit decided. *Id.*
- See ASSUMPSIT; ATTACHMENTS, 1; ESTOPPEL, 9, 14; EXECUTIONS; EXECUTORS AND ADMINISTRATORS, 8-15; HOMESTEADS, 4; MARRIAGE AND DIVORCE.

JUDICIAL SALES.

1. COURTS GO VERY FAR, IN UPHOLDING JUDICIAL SALES, in presuming that officers executing their process have performed their duty, especially after great lapse of time. *Thomas v. Malcom*, 459.
2. STATUTE MAKING IT DUTY OF OFFICER TO CAUSE LAND LEVIED ON to be valued before sale, gives no right to plaintiff or defendant to select an appraiser; and if the officer permits this, it is merely a courtesy on his part, and not the discharge of a legal duty. *Knight v. Whitman*, 652.
3. QUALIFICATION OF APPRAISERS MAY BE SHOWN EITHER BY APPRAISER'S CERTIFICATE, or by the officer's return, where the statute requiring property levied on to be valued before sale does not require the certificate of the officer who qualifies the appraisers to accompany the written appointment. *Id.*

See EXECUTIONS.

JURISDICTION.

See CRIMINAL LAW, 4, 5; EQUITY, 3; ESTATES OF DECEDENTS, 4.

LANDLORD AND TENANT.

See EXECUTORS AND ADMINISTRATORS, 12.

LIENS.

See ATTACHMENTS, 1; ATTORNEY AND CLIENT; EXECUTIONS; HOMETRADE, 5; MECHANICS' LIENS; VENDOR AND VENDEE, 8.

LIS PENDENS.

1. DOCTRINE OF LIS PENDENS AS APPLIED TO COMMERCIAL PAPER NOT DUE AND PAST DUE. — Persons not having actual notice are not bound to take notice of any pending suit affecting commercial paper not due; but it is otherwise as to such paper past due. *Kellogg v. Fancker*, 96.
2. RULES STATED AS TO WHEN LIS PENDENS BEGINS UNDER ENGLISH LAW. *Id.*
3. PERSONS ARE NOT CHARGEABLE WITH CONSTRUCTIVE NOTICE OF ACTION AFTER SERVICE OF SUMMONS AND COMPLAINT and accompanying papers, but before any papers have been filed; nor will the subsequent filing render them chargeable from the time of such service, upon the doctrine of relation. In this case, where an injunctive order was served with the summons and complaint, the above rule was applied. *Id.*
4. PENDENCY OF ANOTHER ACTION FOR SAME CAUSE SHOULD BE PLEADED IN ABATEMENT. After the parties have gone to trial on the merits, this plea is waived, and cannot be taken advantage of. *Welch v. Thompson*, 470.

LOTTERIES.

See ASSUMPSIT, 1, 2.

MALICIOUS PROSECUTION.

1. DEFENDANTS IN ACTIONS FOR MALICIOUS PROSECUTION SHOULD BE ALLOWED GREAT LATITUDE OF INQUIRY, for the purpose of showing probable cause. *Collins v. Hayte*, 521.
2. IT IS COMPETENT TO SHOW ON CROSS-EXAMINATION OF WITNESS FOR PLAINTIFF, IN ACTION FOR MALICIOUS PROSECUTION, that he became a member of the molders' union after he left the defendants' employment, as establishing the influences under which the witness was placed by joining the union, although the evidence did not technically pertain to the matter of the direct examination, where the prosecution complained of as malicious was instituted by the proprietors of a foundry, who employed men contrary to the rules of the union, against certain persons connected with the union, who had conspired to entice away the defendants' employees. *Id.*
3. IT IS COMPETENT FOR DEFENDANTS, IN ACTION FOR MALICIOUS PROSECUTION, TO SHOW what was the object of a meeting of their employees, which was attended by the plaintiff, whether the meeting was held at the place of meeting of the molders' union, and whether the defendants' employees had made any complaints before the strike, and what connection the plaintiff had with such complaints, as establishing a conspiracy, and officious intermeddling and unwarranted conduct by the members of

the union, where the prosecution complained of as malicious was instituted by the proprietors of a foundry, who employed men contrary to the rules of the union, against certain persons connected with the union, who had conspired to entice away the defendants' employees. *Id.*

4. IT IS COMPETENT FOR DEFENDANTS, IN ACTION FOR MALICIOUS PROSECUTION, TO SHOW WHAT OPINION WAS GIVEN THEM BY THEIR ATTORNEY as to their right of action and arrest of the plaintiff, without being confined to the inquiry whether the attorney advised the action to be brought. *Id.*
5. BRINGING ACTION AFTER TAKING COMPETENT LEGAL ADVICE that a right of action exists, will, in most cases, relieve it from the charge of having been brought maliciously and without probable cause. *Id.*

MANDAMUS.

See CORPORATIONS, 31.

MARRIAGE AND DIVORCE.

EQUITY WILL ANNUL, AT SUIT OF WIDOW, JUDGMENT OF DIVORCE obtained by her husband, in his lifetime, on the ground of desertion, where it appears that the separation was voluntary, under written articles, and that the husband, by false representations, obtained service of process in the divorce suit by publication, when personal service could have been had. Nor will such relief be denied because the divorce judgment was thus void for want of jurisdiction; and in such a suit, both the administrator and the heirs are proper parties, where the husband left real and personal property. *Johnson v. Coleman*, 193.

MARRIED WOMEN.

1. **MARRIED WOMAN HAS SUCH POWER OVER HER SEPARATE REAL PROPERTY** as is incident to a complete holding; and if an improvement is necessary for a complete enjoyment, then she can charge it with a debt created in making such improvement. *Lindley v. Cross*, 610.
2. **IN COMPLAINT ON CONTRACT AGAINST MARRIED WOMAN, IT MUST APPEAR AFFIRMATIVELY** that the contract was for the benefit of her separate property. *Id.*
3. **SUPERVISION OF EQUITY OVER POWER OF MARRIED WOMAN TO ENCUMBER HER SEPARATE PROPERTY.** — Such a power is liable to abuse, and must be under the supervision of the court of equity which tries the case involving the liability of her separate property. *Id.*
4. **MARRIED WOMAN'S SEPARATE PROPERTY CANNOT BE BOUND UPON HER CONTRACT**, unless her intent to deal with and bind the property clearly appears. Such intent cannot be assumed; it must appear that the contract is one from which benefit results to the property. *Kantrowitz v. Prather*, 587.
5. **PROFITS OF MARRIED WOMAN'S SEPARATE PROPERTY MAY BE DISPOSED OF BY HER** as if she were a *feme sole*. *Id.*
6. **TO ENFORCE MARRIED WOMAN'S CONTRACT IN EQUITY, IT MUST APPEAR** that it is conscionable, for the betterment of her property rights, and reasonably calculated to promote that end. *Id.*
7. **CREDIT GIVEN TO MARRIED WOMAN ON FAITH OF HER SEPARATE PROPERTY IS NOT SUFFICIENT TO BIND IT, or its income.** It must appear that she intended to create a charge against it, or its income. *Id.*

8. **MARRIED WOMAN DOES NOT RENDER HER PERSONAL PROPERTY LIABLE FOR HER HUSBAND'S DEBTS**, merely by allowing him to have a general use and control over it, consistent with their common interests; although if she permits her husband to deal with and sell it as his own, a purchaser from him would be protected. *Dean v. Basley*, 533.
9. **WISCONSIN STATUTE DEFINING RIGHTS OF MARRIED WOMEN OVER THEIR SEPARATE ESTATE DOES NOT APPLY** to real estate derived from the husband. It applies only to her real estate derived from other sources. *Pike v. Miles*, 148.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. **MASTER IS LIABLE FOR SUCH ACTS OF HIS SERVANTS ONLY** as are within the line of his duty. *Baker v. Kleszy*, 438.
2. **OWNER OF BRIDGE IS NOT LIABLE FOR INJURY CAUSED BY BITE OF DOG** belonging to his toll-keeper, if it appears that he did not authorize or require the dog to be kept, and that it was not needed for the conduct or protection of the business in which the owner of the dog was employed. *Id.*
3. **COMPLAINT CHARGES SUFFICIENT CAUSE OF ACTION FOR INJURY CAUSED THROUGH DEFECTIVE MACHINERY** of railroad company when it states what defects were in the machinery; that defendant had full notice thereof; that, nevertheless, he carelessly and recklessly caused the same to be used; that by reason of such use and defects, a fireman, an employee of the company, was injured; and that said servant had no knowledge, or means of knowing, of such defects. *Columbus & I. C. R'y Co. v. Arnold*, 615.
4. **MASTER OR EMPLOYER IS NOT LIABLE FOR DAMAGES FOR DEATH OF HIS SERVANT**, if the employees of the master having the care and management of the machinery which caused the death, and of its repairs and condition, were competent, and usually careful in the discharge of their duties, although the death was caused by the carelessness of such employees. *Id.*
5. **MASTER OR EMPLOYER IS NOT LIABLE TO SERVANT FOR INJURIES CAUSED SOLELY BY CARELESSNESS** or negligence of another employee of the same master. The master is not an insurer, unless he expressly so stipulates. The fact that the servant who is injured is inferior in grade to, and is under the command of, the servant whose neglect caused the injury does not change this rule, if both are engaged in the same general business. *Id.*
6. **MASTER IS NOT LIABLE FOR INJURY CAUSED TO ONE OF HIS SERVANTS BY CO-SERVANT**, though the latter is not engaged in the operation or particular work. It is enough to exempt the master from liability that the servants are both in the employment of the same master, engaged in the same common enterprise. *Id.*
7. **CORPORATION CAN BE HELD LIABLE FOR INJURIES TO ITS SERVANTS** only when the injury has been caused by the neglect of its board of directors to perform some duty which devolved upon them. *Id.*
8. **BOARD OF DIRECTORS OF RAILROAD COMPANY ARE ITS IMMEDIATE REPRESENTATIVES**, and occupy the relation of master to the various employees engaged in operating the road and superintending and performing the business of the company in its various departments. *Id.*
9. **MASTER-MACHINIST IS FELLOW-SERVANT OF FIREMAN**. — A master-machinist who has the immediate charge, control, and direction of the engines and

- other machinery of a railroad company, and the repairs thereof, and the control and direction of the engineers and firemen on the trains, is a fellow-servant of such a fireman. *Id.*
10. RAILROAD CORPORATION MUST USE EVERY REASONABLE CARE IN PROPER CONSTRUCTION OF ITS ROAD, and in supplying it with necessary equipments, including properly constructed engines, and necessary and proper materials for its repair, and the selection of competent, skillful, and trusty subordinates. If these duties are performed with care and diligence by the directors, and one of the employees so employed is guilty of negligence, by which an injury occurs to another employee, the company is not responsible. *Id.*
 11. NOTICE TO DIRECTORS OF RAILROAD COMPANY THAT ENGINE IS OUT OF REPAIR AND UNSAFE for use is not of itself sufficient to render the company liable for injuries which may result from such defect to the employees of the company. Where they have placed it in the hands of a competent and trustworthy master-machinist, and have furnished him with adequate materials and resources for the repair thereof, they must have notice that the engine is being used while unsafe and out of repair, or they will not be liable for injuries to a fireman employed by the company, occasioned by the explosion of the engine's boiler. *Id.*
 12. RAILROAD COMPANY IS NOT REQUIRED TO PROVIDE AGAINST ALL SUCH UNFORESEEN ACCIDENTS or misfortunes as could not be averted by the utmost care and diligence; and it is misleading and erroneous to instruct, in an action for causing the death of an engineer who was killed by a dead tree falling across the track, that it was the duty of the corporation to keep the road free from all objects and obstructions which might imperil the safe transit of trains. *Louisville & N. R. R. Co. v. Filbert*, 690.
 13. IMPLIED UNDERTAKING OF EMPLOYEES IN SAME SERVICE TO RISK CONTINGENCIES which the ordinary skill and care of each, in his line of service, could not avert, does not exonerate railroad company from liability for damages resulting to one of such co-agents from the extraordinary or gross negligence of another of them. *Id.*
 14. RAILROAD COMPANY IS LIABLE FOR DEATH OF ENGINEER, if the section boss or some other agent of the company than the engineer was alone guilty of willful negligence causing the death, notwithstanding, in his own sphere, the engineer may have been guilty of some neglect of duty. *Id.*
 15. WILLFUL NEGLECT MUST INVOLVE EITHER INTENTIONAL WRONG, OR SUCH RECKLESS DISREGARD of security and right as to imply bad faith; and it is erroneous to so instruct, in an action for the death of an engineer caused by a dead tree falling across the track, as to make the question of willful negligence depend on the knowledge or belief of the road-master, or section boss, as to whether the tree was decayed and subject to fall or be blown across the track, and his failure, though so apprised, to remove it; for though these are facts from which the jury might infer willful neglect, they do not necessarily constitute it. *Id.*

See AGENCY, 1, 2; RAILROADS, 3-6.

MECHANICS' LIENS.

1. MECHANIC'S LIEN CANNOT BE ENFORCED when the contract under which it arises is made with another than the ostensible owner of the property
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at the time, and without his consent or authority. *Galbreath v. Davidson*, 233.

2. MECHANIC'S LIEN, NOTICE, OR CLAIM IS VOID IF IT DOES NOT DESCRIBE PREMISES upon which the lien is claimed, and cannot be reformed in equity. *Lindley v. Cross*, 610.
3. WHARF-BOAT IS LIABLE FOR MECHANIC'S LIEN, as it is attached to the soil, and savors of the realty. *Galbreath v. Davidson*, 233.

MISTAKE.

1. EQUITY RELIEVES AGAINST MISTAKES AND ACCIDENTS, not only as against original parties, but also those claiming under them with notice of the facts. *Simpson v. Montgomery*, 228.
2. EQUITY WILL RELIEVE AGAINST MISTAKE of commissioner of deeds, who, being a commissioner for two states, by mistake, describes himself in his certificate of acknowledgment as commissioner of deeds for the wrong state. *Id.*

MORTGAGES.

1. CONSTRUCTIVE NOTICE OF UNRECORDED MORTGAGE, AFFORDED BY POSSESSION OF MORTGAGEE, ONLY GOES TO EXTENT of putting persons upon inquiry, and requiring a subsequent purchaser to apply for information to the person in possession. *Riley v. Quigley*, 516.
2. PURCHASER AT FORECLOSURE SALE TAKES WITH CONSTRUCTIVE NOTICE OF ANY PRIOR SALE ON EXECUTION. *Raymond v. Holborn*, 105.
3. WHERE PRIOR MORTGAGEE IS MADE PARTY ON FORECLOSURE OF SECOND MORTGAGE, AND HIS MORTGAGE IS FIRST PAID, pursuant to the decree, from the proceeds of the sale, the purchaser's rights are subject to the lien of a judgment intermediate between the two mortgages. *Id.*
4. CHATTEL MORTGAGE WHICH, BY LAWS OF STATE WHERE IT IS MADE, IS NOT PER SE FRAUDULENT as to *bona fide* creditors of the mortgagor, because the property is permitted to remain in the possession of the mortgagor after the maturity of the debt, will be so construed, notwithstanding that by the laws of another state, into which the property is subsequently brought by the mortgagor, and where it is attached by a *bona fide* resident creditor of the mortgagor, it would be fraudulent *per se*. *Mumford v. Canty*, 525.
5. MORTGAGE OF STOCK OF GOODS IS FRAUDULENT AND VOID AS TO CREDITORS, where it contains a provision authorizing the mortgagor to retain possession for the purpose of selling in the usual course of trade. *Barnet v. Fergus*, 547.
6. CHATTEL MORTGAGEE'S PERMISSION FOR MORTGAGOR TO SELL IN ORDINARY COURSE OF TRADE, EFFECT OF. — Though a chattel mortgage on a stock of goods contains no provision authorizing the mortgagor to retain possession for the purpose of selling in the usual course of trade, yet if the mortgagee knowingly permits the mortgagor to make such sale, and in the same way as before the mortgage was made, it is a perversion of the mortgage from its legitimate purposes, sufficient to withdraw from its protection, and place within the reach of other creditors all of the property which the mortgagee had permitted the mortgagor to hold for sale in the ordinary course of his business. *Id.*
7. SUBSEQUENT ACTS OF CHATTEL MORTGAGEE MAY INVALIDATE HIS MORTGAGE IN PART WITHOUT RENDERING IT VOID IN TOTO; as where a chattel mortgage covers different kinds of property, such as a stock of

goods in a store, held for the purposes of trade, and a number of horses upon a farm; the fact that the mortgagee loses his lien as to whatever goods he permits the mortgagor to keep for sale does not render the mortgage invalid as to the horses. *Id.*

8. FACT THAT CHATTEL MORTGAGE PERMITS MORTGAGOR TO CONTROL PORTION OF MORTGAGED PROPERTY in a manner inconsistent with his rights as a mortgagee does not of itself invalidate the instrument as to other property not so controlled. At most, it is only a circumstance which may be considered by the jury, in connection with other facts, in determining the good faith of the transaction, in finding out whether the mortgage was originally made to defraud creditors, in which case it would, of course, be void as to both classes of property. *Id.*
9. CHATTEL MORTGAGE VOID AS TO PART, BUT VALID AS TO REMAINDER. — A chattel mortgage, valid upon its face and at its inception, covered a printing-press and its appurtenances, and certain books and blanks, which had been printed by the mortgagor, and which were held by him for sale. The mortgagor continued, with the mortgagee's knowledge, to sell such books and blanks in the same way after the mortgage was made as before. *Held*, that the mortgagee lost his lien as against creditors, so far as the books and blanks were concerned, but not as to the printing-press and its appurtenances. *Id.*

See DEEDS, 21; EXECUTIONS, 26; PLEDGE; POWERS.

MURDER.

See CRIMINAL LAW, 6-8.

NE EXEAT.

1. WRIT OF NE EXEAT IS IN NATURE OF EQUITABLE BAIL, and an arrest and restraint of liberty upon such writ is not "imprisonment for debt," within the meaning of a constitutional prohibition on that subject. *Dean v. Smith*, 198.
2. WRIT OF NE EXEAT IS PROPERLY ISSUED in an action to compel a partnership accounting, where the complaint and affidavits show that the defendant had sold all his property in the state, and converted it into money or choses in action, and is threatening to leave the state. *Id.*

NEGLIGENCE.

1. SLIGHT NEGLIGENCE IS MERELY ABSENCE OF THAT DEGREE OF CARE AND VIGILANCE which persons of extraordinary prudence and foresight are accustomed to use. *Dreher v. Fitchburg*, 91.
2. SLIGHT NEGLIGENCE CONTRIBUTING DIRECTLY TO INJURY WILL NOT PREVENT RECOVERY. *Id.*
3. WANT OF ORDINARY CARE CONTRIBUTING DIRECTLY TO INJURY WILL PREVENT RECOVERY. *Id.*
4. ORDINARY NEGLIGENCE IS WANT OF SUCH CARE AS PERSONS OF ORDINARY PRUDENCE or the mass of mankind observe. *Id.*
5. RULE THAT PLAINTIFF CANNOT RECOVER IF HIS OWN WRONG CONDUCTED TO HIS INJURY is confined to cases where his wrong or negligence has immediately or proximately contributed to the result. *Kline v. Central Pac. R. R. Co.*, 282.
6. PROOF OF ONE ONLY OF TWO GROUNDS OF LIABILITY FOR NEGLIGENCE is sufficient to authorize a recovery, where both are alleged. *Martin v. Western Union R. R. Co.*, 189.

7. TOWN IS LIABLE FOR INJURY CAUSED BY DEFECTIVE HIGHWAY, though the injury was in part caused by a defect in the axle of plaintiff's vehicle, provided the accident would not have occurred except for the defect in the highway. *Dreher v. Fitchburg*, 91.
8. NEGLIGENCE CANNOT BE IMPUTED TO INFANT EIGHTEEN MONTHS OLD. It is utterly incapable of exercising any care or discretion in any matter whatever. As to avoiding danger, its acts are not to be judged by the rules applied to adults. All that can be required is a degree of care or diligence equal to the capacity of the child. *Schwartz v. Milwaukee etc. Ry Co.*, 158.
9. LIABILITY OF RAILROAD COMPANY FOR INJURY TO INFANT FROM FAILURE TO ERECT FENCE. — If an infant eighteen months old gets upon a railroad track in consequence of the failure of the railroad company to erect a fence as required by law, and is run over and injured by a train on the track, the company is liable to it for the injury, if the parents exercised ordinary care in guarding the child. *Id.*
10. RAILROAD COMPANY IS LIABLE FOR INJURY BY FIRE, caused either by negligence in running a railroad train through a city at an unlawful speed, or in opening grates and flues of the engine in a careless manner, and thereby allowing lighted cinders to be thrown upon the plaintiff's premises. *Martin v. Western Union R. R. Co.*, 189.
11. IT IS NOT EVIDENCE OF SUCH CONTRIBUTORY NEGLIGENCE AS WOULD PREVENT RECOVERY, that part of a pane of glass was out of a window of the plaintiff's house, adjoining the defendant's road, and that the damage was caused by sparks blown through the window from the defendant's engine, which was being drawn at unlawful speed. *Id.*
12. QUESTION OF NEGLIGENCE IS OF FACT FOR JURY, AND WILL BE SUBMITTED TO THEM, except in those cases where the proof is so clear and decisive in its character as to warrant the court in saying, as a matter of law, that there is nothing to submit. *Detroit etc. R. R. Co. v. Curtis*, 141.
13. FACTS SHOWING WHEN QUESTION OF NEGLIGENCE SHOULD BE SUBMITTED TO JURY. If the evidence tends to show that a railroad train had come to a full stop, that the persons waiting to get upon it were told to go on board by the persons in charge, and that the plaintiff, in attempting to get aboard, was injured in consequence of the sudden starting of the train, it is not error to submit the question of the negligence of the parties to the jury. *Id.*
14. IT IS NEGLIGENCE IN SERVANTS OF RAILROAD COMPANY TO TELL PASSENGERS TO GO ABOARD WHEN TRAIN IS NOT READY FOR THEIR RECEPTION. After being told to go on board in any car, a passenger has a right to draw the conclusion that the train is ready for his reception, and he cannot be considered negligent in attempting to do so. *Id.*
15. CONTRIBUTORY NEGLIGENCE INSUFFICIENT TO WITHDRAW PLAINTIFF'S CASE FROM JURY. — Where a plaintiff, in attempting to get aboard a railroad train, was injured in consequence of its sudden starting, the fact that he was told by the company's servants to get on the hind car, and that he was injured in trying to get on another passenger-car, is not such conclusive proof of negligence on his part as to take the case from the jury. *Id.*
16. TO ATTEMPT TO GET ON OR OFF WHILE RAILROAD CARS ARE IN MOTION IS ACT OF NEGLIGENCE. *Id.*
17. RAILROAD COMPANIES ARE NOT REQUIRED TO HAVE SPECIAL AGENTS, WEARING BADGES, TO PREVENT PASSENGERS FROM INJURING THEM-

THEMSELVES by negligent acts in getting on or off railroad trains. They have a right to assume that travelers can take care of themselves in traveling upon railroads constructed with proper care and skill. *Id.*

18. RAILROAD COMPANY'S OMISSION TO RING BELL OR SOUND WHISTLE AT ROAD-CROSSING, as required by statute, is *prima facie* evidence of negligence. *St. Louis etc. R. R. Co. v. Terhune*, 504.

See ATTACHMENTS, 3-6; MASTER AND SERVANT; RAILROADS.

NEGOTIABLE INSTRUMENTS.

1. INDORSEMENT ON INSTRUMENT IN FORM OF PROMISSORY NOTE that the payee or bearer was "not to expect payment" until certain property of the maker was "sold for a fair price," if made at the time the note was signed, makes it a mere conditional agreement, and an action cannot be sustained thereon without showing a fulfillment of the condition. *Blake v. Coleman*, 53.
2. PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT CONDITION INDORSED ON NOTE was on the note when it was signed. *Id.*
3. LEGAL EFFECT OF INDORSEMENT ON NOTE THAT PAYEE OR BEARER is "not to expect" payment until certain property of the maker is "sold for a fair price" is, it seems, that the maker is to sell the property; and parol evidence would be incompetent to show that it was agreed that the payee was to sell it. *Id.*
4. ONE WHO TAKES NEGOTIABLE NOTE IN EXTINGUISHMENT OF ANTECEDENT INDEBTEDNESS IS HOLDER THEREOF FOR VALUE. *Kellogg v. Fancher*, 96.
5. BONA FIDE HOLDER OF NEGOTIABLE NOTE FOR VALUE, WHO IS, AND WHEN PROTECTED. — Where A gave his individual note, for his private debt, to B, and B took in payment thereof notes of third persons running to A, but which were in fact the property of a copartnership of which A is a member, B will be protected as a *bona fide* holder for value, if he was ignorant of the existence of such copartnership. *Id.*
6. FAILURE IN WHOLE OR IN PART OF CONSIDERATION FOR PROMISSORY NOTE, after a *bona fide* assignment before maturity, is not available as a defense in an action by the assignee against the maker, though the assignee had, at the time of the assignment, full knowledge of the consideration for which the note was given. *Splivallo v. Paten*, 358.
7. NOTE IS WITHOUT CONSIDERATION, where it is made by one, whose building accidentally took fire, to another to whose building the fire extended, under the false representations of the latter that he could prove the former was the cause of the fire, thereby inducing him to believe that he was in some way liable. *Knotts v. Preble*, 514.
8. WHEN OR IN WHAT TIME HOLDER OF CHECK IS LEGALLY BOUND TO PRESENT IT for payment, in order to hold the drawer responsible for non-payment, is a question of law. *Cawein v. Brosinski*, 684.
9. PRESENTMENT OF CHECK ON DAY AFTER IT IS DRAWN, DURING BANKING HOURS, is sufficient to charge the drawer, though the holder received it during banking hours of the day it was drawn, and could have presented it on that day. *Id.*
10. IT IS PRIMA FACIE EVIDENCE OF LACHES to hold a foreign sight draft fourteen days before sending it forward. But this delay may be explained, and the presumption of laches may be overcome by proof. *Wales v. Dart*, 177.
11. NEGOTIABLE NOTE PAYABLE BY INSTALLMENTS IS DISHONORED WHEN FIRST INSTALLMENT IS OVERDUE and unpaid. *Field v. Tibbets*, 779.

12. DEFENSE THAT NEGOTIABLE NOTE WAS GIVEN IN PART FOR INTOXICATING LIQUORS cannot be set up against any holder for a valuable consideration, and without notice of the illegality of the contract, notwithstanding it was past due when he took it. *Id.*
 13. UNDER MAINE STATUTE, FACT THAT NOTE IS OVERDUE IS NOT NOTICE, either express or implied, that it was given for intoxicating liquors. *Id.*
 14. IN ORDER TO BIND ACCOMMODATION INDORSER of negotiable instrument, he must be given due notice of non-payment according to the rules of the law merchant. *Field v. New Orleans D. N. Co.*, 699.
 15. DOCTRINE ON WHICH NECESSITY OF NOTICE of non-payment to an indorser of negotiable paper rests is the presumption of damage or prejudice in his favor, he being entitled to recourse against another. *Id.*
 16. INDORSER OF NEGOTIABLE INSTRUMENT, who is entitled to recourse against another, is presumed to be injured by delay in notice of non-payment. He is entitled to prompt notice. *Id.*
 17. NOTARY'S CERTIFICATE OF NOTICE OF DISHONOR is defective when it fails to state where notice was served on the indorser; it should state that notice was made at the indorser's residence or place of business. *Slocumb v. De Lisardi*, 740.
 18. IF NOTICE OF DISHONOR IS NOT GIVEN, it is presumed that the indorser is prejudiced by such omission, and he is discharged from liability. *Id.*
- See AGENCY, 4; CONTRACTS, 3; EXECUTORS AND ADMINISTRATORS, 8-10; JUDGMENTS, 1; PARTNERSHIP, 4-9; PLEDGE.

NOTARIES.

See NEGOTIABLE INSTRUMENTS, 17.

OFFICE AND OFFICERS.

OFFICER CANNOT OBJECT FOR FIRST TIME ON APPEAL THAT THERE WAS NO PROOF OF HIS OFFICIAL CHARACTER in the lower court, on the trial of an action against him to recover for damages arising to property while in his custody, and by reason of his neglect. The objection should first be made in the court below, so as to give an opportunity to obviate it by proof. *Jones v. McGuirk*, 556.

PARTITION.

PARCEL OR INFORMAL PARTITION — POSSESSION NEED NOT BE FOR SEVEN YEARS TO PERFECT TITLE. — Where commissioners have been appointed to make partition between co-tenants, and they divide the property, but neglect to report to the court, and have the partition confirmed, and the co-tenants take possession of their allotted shares, and make improvements in pursuance of the partition, the title of each is complete, and it is error to instruct the jury that such possession must continue for the full period of the statute of limitations. *Welch v. Thompson*, 470.

PARTNERSHIP.

1. FARMERS ARE JOINT OWNERS, AND NOT PARTNERS, where they purchase a thrashing-machine in common, which they use and operate together, and for which they give the vendors a note, signed by both individually. *Iliff v. Brasill*, 645.

2. **AGREEMENT BETWEEN PARTNERSHIP AND LABORERS**, that the latter are to have a share of a crop to be raised, as compensation for their services, does not make them members of the partnership, nor give them any right to contract debts against it; they need not, therefore, be made parties to a bill against it. *Christian v. Crocker*, 223.
3. **PARTNER IN COMMENDAM DOES NOT BECOME RESPONSIBLE** for liabilities created by the active partner after the expiration of such partnership, from the fact that he fails to have a settlement of its affairs; nor is such partner liable as a general partner if he allows his money to remain in the firm after its expiration, believing himself to be a partner in *commendam*, and liable only for the amount invested, unless he has done or permitted some act which could have induced creditors to believe him to be a general partner. *Slocumb v. De Lizardi*, 740.
4. **WHERE ONE OF TWO PARTNERS INDORSES NOTE IN NAME OF FIRM**, as an accommodation for a third person, without the authority or consent of the other partner, the latter is not bound by such indorsement as to any party taking the note with notice that the indorsement was made in the character of surety. And, in such case, the burden of proving the authority or consent of the copartner rests on the creditor or holder of the note. *Hendrie v. Berkowitz*, 251.
5. **WHERE THIRD PERSON FINDS NOTE, INDORSED BY MEMBER OF FIRM IN FIRM NAME, IN HANDS OF MAKER**, this is notice to him that the firm indorsement was for the accommodation of the maker. *Id.*
6. **TO BIND PARTNER BY NOTE DRAWN BY COPARTNER IN HIS OWN NAME**, it must appear that such name was the style of the firm. *Macklin v. Crutcher*, 608.
7. **PARTNER IS EXONERATED, IF INDIVIDUAL NOTE OF COPARTNER** is accepted as a merger and discharge of the partnership liability. *Id.*
8. **PARTNER IS NOT LIABLE UPON INDIVIDUAL NOTE OF COPARTNER** given upon the purchase of goods for the use of the firm; though he may be liable upon the implied contract, unless the note was accepted in discharge of the partnership liability. *Id.*
9. **PARTNER RATIFIES ACT OF COPARTNER**, not within the scope and usage of the partnership, in purchasing property on the firm credit, by obtaining possession and selling it as firm property. *Porter v. Curry*, 520.
10. **WHERE PARTNERSHIP, WHICH IS AFTERWARDS DISSOLVED** by the death of one of its members, has indorsed a note or bill, notice of dishonor must be given to the surviving member in order to bind the firm, especially when he is its liquidator or representative. Notice to the executor of the deceased partner, who does not represent and has no power to administer the partnership affairs, is not sufficient. *Slocumb v. De Lizardi*, 740.
11. **SURVIVING MEMBER OF PARTNERSHIP OWNING REAL PROPERTY IS TRUSTEE** for the purpose of winding up the affairs of the firm, and must account and pay over to the administrator of the deceased partner the value and profits of the use and occupation thereof. *Smith v. Walker*, 415.
12. **SURVIVING PARTNER MUST ACCOUNT AND PAY OVER TO ADMINISTRATOR OF DECEASED PARTNER** all the profits of the realty and personality of the firm which rightfully belong to the estate, although he has purchased the interest of the heirs, or the community interest of the surviving wife of the deceased partner; it is for the probate court to distribute the estate to the parties entitled. *Id.*

See AGENCY, 4.

PATENTS.

See CORPORATIONS, 27.

PERJURY.

See CRIMINAL LAW, 5.

PLEADING AND PRACTICE.

1. PERSONS WHO WILL NOT BE AFFECTED BY JUDGMENT ARE NOT NECESSARY PARTIES. Thus in an action upon promissory notes, upon which plaintiff agreed, in consideration of the promise of a third person to pay them upon the confirmation of the title of his grantor to certain lands, to forbear suit until the decision of the question of such title, it was held that neither such third person nor his grantor were necessary parties to the action. *Smith v. Lawrence*, 344.
2. SEVERAL ACTIONS COULD NOT BE MAINTAINED ON JOINT CONTRACT before the adoption of the code in Kentucky. *Gossom v. Badgett*, 658.
3. WHERE COMPLAINT ALLEGES JUDGMENT, ISSUANCE OF EXECUTION AND SALE thereunder of land, and the answer denies the validity of the judgment, and that the plaintiff acquired any title by the pretended sale, the execution and sale are not sufficiently denied to require the execution to be put in evidence. *Lee v. Figg*, 271.
4. PARTY IS NOT PERMITTED TO DIVIDE UP HIS OBJECTIONS OR CLAIMS FOR RELIEF by several motions, where complete relief can be granted upon one; and all known objections or claims for relief against the same irregularities not urged by the first motion, are waived. *Bonsteel v. Orris*, 201.
5. GENERAL DENIAL, UNDER CODE PRACTICE, MERELY PUTS IN ISSUE such of the averments of the complaint as the plaintiff is bound to prove. *Adams Exp. Co. v. Darnell*, 582.
6. OBJECTION TO COMPLAINT FOR WANT OF PARTIES IS WAIVED, if not taken advantage of by demurrer on that ground, though sought to be reached by a demurrer for want of facts sufficient to constitute a cause of action. *Grain v. Aldrich*, 423.
7. OMISSION TO DEMUR FOR WANT OF PARTIES DOES NOT AFFECT POWER OF COURT, under section 17 of the California Practice Act, to direct other parties to be brought in, if it finds it impossible to completely determine the controversy without them. *Id.*
8. COMPLAINT STATING FACTS ENTITLING PLAINTIFF TO ANY RELIEF, either in law or in equity, is not demurrable for want of facts. *Id.*
9. PRAYER OF COMPLAINT IS NOT DEMURRABLE. *Althof v. Conheim*, 363.
10. WHERE THERE IS NOT ENTIRE ABSENCE IN PLEADING OF ALLEGATIONS constituting cause of action or defense, and no demurrer is filed, or objection made in the court below, the judgment will not be disturbed by the appellate court. *Lee v. Figg*, 271.
11. PARTY STANDING BY PLEADING NEED NOT RESERVE EXCEPTION TO DECISION sustaining a demurrer thereto, in order to take advantage of the ruling on appeal from the judgment. *Smith v. Lawrence*, 344.
12. PURPOSE OF RESERVING EXCEPTION IS TO MAKE MATTER OF RECORD the decision of the court upon a question of law presented to it, which would not otherwise appear of record. *Id.*
13. NO PROVISION OF KENTUCKY CODE ABROGATES PRINCIPLE THAT PLAINTIFF CAN RECOVER only upon proof of the cause of action alleged in his pleading. *Gossom v. Badgett*, 658.

14. FAILURE OF PROOF EXISTS UNDER CODE SYSTEM AS WELL AS AT COMMON LAW, when the plaintiff, in an action against one defendant, declares upon a joint undertaking of the defendant and another, and proves only a separate agreement of the defendant; for there is a want of identity between the contract declared on and the contract proved, which would prevent the judgment from being a bar to another action on the contract proved. *Id.*
15. PROOF MUST CORRESPOND WITH ALLEGATIONS. *Caldwell v. Nell*, 738.
16. WHERE CASE INVOLVING QUESTIONS BOTH OF LAW AND OF EQUITY is tried without a jury, the more regular and orderly practice is to first dispose of the equitable branch of the case. *Martin v. Zellerbach*, 865.
17. RECORD IN CASE INVOLVING QUESTIONS BOTH OF LAW AND OF EQUITY which is tried without a jury should show that the equitable issues were first disposed of, if that course was followed; or if the whole action and all the issues were tried and submitted together, that fact should appear. *Id.*
18. WHETHER APPEAL LIES FROM JUDGMENT DETERMINING QUESTION of an equitable nature alone, and leaving the issues of law wholly undisposed of, *quere. Id.*
19. UNDER WISCONSIN PRACTICE, WHERE CAUSE IS TRIED BY COURT WITHOUT JURY, the supreme court, on appeal, must determine whether the finding of facts is in accordance with the weight of evidence, although there was no motion for a new trial. *Walsh v. Dart*, 177.
20. SUFFICIENCY OF EVIDENCE TO JUSTIFY ITS FINDINGS CAN BE REVIEWED in court which found the facts only upon motion for new trial. *Prince v. Lynch*, 427.
21. COURT CANNOT RE-EXAMINE EVIDENCE AND SUBSTITUTE DIFFERENT FINDINGS OF FACT after trial and rendition of judgment and filing of findings. *Id.*
22. MISLEADING INSTRUCTIONS TO JURY SHOULD BE EXPLAINED OR MODIFIED, OR BE REFUSED. *Snydacker v. Brosse*, 551.
23. ERRONEOUS INSTRUCTION NOT PREJUDICIAL IS NOT GROUND FOR REVERSAL. *Sawyer v. Chicago & N. W. R'y Co.*, 49.
24. SUFFICIENCY OF EXCEPTIONS TO CHARGE GIVEN TO JURY — NECESSITY FOR SPECIFIC OBJECTIONS. — An exception to the general charge to a jury, especially if such charge is lengthy, must point out specifically the portion of the charge objected to. Thus where such a charge consisted of about forty folios, defendant excepted generally; and also excepted "to the rejection of the instructions asked by it, to all that part of the charge wherein the instructions given at its request were in any wise qualified or against it, to all that part wherein the court commented on the evidence, and to all the remarks to the jury not relating to points raised or to the merits of the case": held, that the exceptions were too general to raise any question except as to the correctness of the instructions asked by defendant and refused. *Strohn v. Detroit & M. R. R. Co.*, 114.
25. VERDICT OF JURY WILL NOT BE DISTURBED by the supreme court, where there is a conflict of evidence. *St. Louis etc. R. R. Co. v. Terhune*, 504.
26. WHERE THERE IS EVIDENCE TO SUSTAIN VERDICT OF JURY, the appellate court will not disturb their finding. *Kitchens v. Kitchens*, 453.
27. UNLESS IN FINDING OF JURY THERE IS EVIDENCE OF PASSION, PREJUDICE, OR MISTAKE, showing a misuse of their power, their finding will not be disturbed. *Wooten v. Wilkins*, 456.

28. FINDING OF JURY WILL NOT BE DISTURBED where the case has been properly submitted to them, and their verdict is not manifestly wrong. *Bruce v. Cresce*, 467.
 29. IT IS ERROR TO INSTRUCT THAT FINDING ONE ISSUE in favor of plaintiff will entitle him to recover, when, in order to gain the suit, all of the issues must be found in his favor. *Galbreath v. Davidson*, 233.
 30. ERROR IN REFUSING NONSUIT IS CURED, where the defect in the evidence is afterwards supplied. *Martin v. Western Union R. R. Co.*, 189.
 31. WHERE ATTORNEYS STIPULATE WHAT ARE FACTS IN CASE, agreeing that the stipulation shall form part of the judgment roll, and that no other statement on appeal shall be necessary, the facts therein recited stand in the place of a finding of the facts by the court, no statement on appeal is necessary, and no specification of the errors relied upon need be made in the record. *Brewster v. Hartley*, 237.
 32. IF CASE BE SUBMITTED UPON STIPULATED FACTS WITHOUT RESERVING QUESTION OF COMPETENCY, relevancy, or admissibility of any fact in the statement, the question cannot be raised in the appellate court that such facts are not properly before the court. *Id.*
 33. APPEAL MAY BE TAKEN FROM JUDGMENT RENDERED BY JUDGE AT CHAMBERS in a special proceeding to try the [validity of a corporate election. *Id.*
 34. APPEAL MAY BE TAKEN, IN INDIANA, FROM INTERLOCUTORY ORDER DIRECTING DELIVERY OF POSSESSION OF REAL PROPERTY, OR SALE THEREOF, if taken at the same term of the court at which the order was made; or if the order is made in vacation, the appeal may be taken either at the time the order is made, or during the next term. *Simpson v. Pearson*, 577.
 35. ORDER OF COURT PRIOR TO THAT APPEALED FROM, AND ADJUDICATING SAME MATTER, will not be considered in the appellate court, unless the evidence of it appears in the record on appeal. *Dean v. Smith*, 198.
 36. JUDGMENT FOR DEFENDANT WILL NOT BE REVERSED where plaintiff would be entitled to no more than nominal damages. *Mecklen v. Blake*, 68.
- See ASSIGNMENTS; CONSTITUTIONAL LAW; ESTOPPEL, 11; INJUNCTIONS; JUDGMENTS; LIS PENDENS; OFFICE AND OFFICERS.

PLEDGE.

1. WHETHER NEGOTIABLE PAPER IS HELD IN MORTGAGE OR PLEDGE, which is indorsed to and held by a creditor as security for the payment of a debt, without any other express agreement, *quere*. *Donohoe v. Gamble*, 399.
2. WHETHER FORECLOSURE AND SALE OF NEGOTIABLE INSTRUMENT HELD IN PLEDGE can be decreed in satisfaction of the debt for which it is held, under ordinary circumstances, *quere*. *Id.*
3. FORECLOSURE AND SALE OF NEGOTIABLE INSTRUMENT HELD AS PLEDGE is authorized, when the maker resides in a remote country or a different state, and it does not appear that he has any property within the jurisdiction subject to seizure and sale. *Id.*

POWERS.

1. IF ADVERTISEMENT OR NOTICE OF SALE UNDER POWER OF SALE contained in a mortgage describes a different and other or larger indebtedness than that described in or secured by the mortgage, the sale is not rendered

invalid, if it is not shown that the property was injuriously affected, or bidders deterred from attending the sale, or that the notice was published for a fraudulent purpose; or if so, that defendants participated in it, or had any knowledge of it. *Hamilton v. Leubke*, 562.

2. ASSIGNMENT OF MORTGAGE CONTAINING POWER OF SALE, by indorsement on the mortgage without an assignment of the note, will not operate to vest the power of sale in the assignee. As the mortgage is not an assignable instrument by indorsement, either by common law or under the statute, the power to sell remains in the mortgagee. *Id.*
3. ASSIGNMENT OF NOTE SECURED BY MORTGAGE containing power of sale vests the power of sale in the assignee. *Id.*
4. PURCHASER AT SALE UNDER POWER CONTAINED IN MORTGAGE is chargeable with notice of defects and irregularities attending the sale, and cannot evade their effect. *Id.*
5. REMOTE AND INNOCENT PURCHASERS FOR VALUABLE CONSIDERATION from purchaser at sale under power contained in mortgage are not chargeable with notice of irregularities or equities attending the sale. These are matters *in pais*, which must be brought home to their knowledge on a proper case made, and sustained by proof. *Id.*
6. AS TO REMOTE AND INNOCENT PURCHASERS FROM PURCHASER at sale under a power contained in a mortgage, the record of the mortgage is notice to them only of the facts stated therein. It is not notice of any irregularities attending the sale. *Id.*
7. MORTGAGOR ON OBTAINING KNOWLEDGE OF SALE UNDER POWER contained in the mortgage must immediately take steps to set it aside for irregularities attending it, or a ratification by him will be implied. Four years after he has knowledge of the sale and proceedings, and has remained inactive, thereby acquiescing and encouraging purchasers, is too late to redeem, and he is barred of his right. *Id.*

PROCESS.

1. FOR PURPOSE OF EXECUTING CIVIL PROCESS, NO OFFICER HAS LEGAL AUTHORITY TO BREAK OUTER DOOR, or other outside protection to a person's house. *Snydacker v. Broese*, 551.
2. AFTER HAVING PEACEABLY EFFECTED ENTRANCE INTO DEFENDANT'S HOUSE, an officer may, in the execution of civil process against his goods, after a request and refusal, break open any inner doors belonging to him, in order to take the goods. *Id.*
3. RULES STATED AS TO BREAKING OPEN DOORS IN EFFECTING ARREST EITHER ON CIVIL OR CRIMINAL PROCESS. *Id.*
4. LAW DOES NOT AUTHORIZE PERSON TO EXECUTE PROCESS IN HIS OWN FAVOR. *Id.*
5. LIABILITY OF OFFICER FOR ABUSE OF PROCESS. — If an officer armed with a writ abuses it by the commission of any act not warranted by the process, he thereby becomes a trespasser *ab initio*, and is liable, not only for the property taken by him, but also for any damage which was the immediate result of his acts. *Id.*
6. PLAINTIFF IN EXECUTION IS EQUALLY LIABLE WITH OFFICER FOR ABUSE OF PROCESS BY LATTER, if he command or advise such abuse; and he is liable in trespass for his act, not only where the proceedings are irregular, or where the court has no jurisdiction, but also in a case where all the proceedings are regular, and where he would not, except for such abuse, incur liability. *Id.*

7. IT IS ERROR TO ADMIT HEARSAY EVIDENCE TO PROVE THAT ONE AIDED, ADVISED, OR ABETTED OFFICER TO ABUSE HIS POWER. *Id.*
8. SERVICE OF PROCESS IN REM SHOULD BE MADE OPENLY, AND WRITTEN NOTICE LEFT WITH PERSON IN POSSESSION; and the officer's acts of custody and control should be exercised in such an open and visible manner, by a custodian or otherwise, that the person having the thing in charge may take the necessary steps to protect the rights of all those interested in it. *Jones v. McGurk*, 558.

See ATTACHMENTS; EXECUTIONS.

PUBLIC LANDS.

1. LAND PATENT ISSUED BY PROPER OFFICERS OF UNITED STATES IS PRESUMED to be valid, and is *prima facie* evidence of regularity in all the preliminary steps to entitle the patentee thereto. *Schnee v. Schnee*, 183.
2. PURCHASER FOR VALUABLE CONSIDERATION FROM PATENTEE IN POSSESSION TAKES FREE of all equitable claim as against the patentee's title of which he had no actual notice, although documentary evidence of a mistake in the issue of a patent existed in the files and records of the general land-office, and the record in the proper register's office of the entry certificate was in the name of a party other than the patentee. *Id.*

PUBLIC POLICY.

See CONTRACTS, 2-4, 10.

RAILROADS.

1. STREET RAILWAY CORPORATION ACCEPTS CHARTER ON IMPLIED CONDITION that it will not injure others by the construction or maintenance of its road. *Alton & U. A. H. R'y v. Deitz*, 509.
2. STREET RAILWAY CORPORATION IS RESPONSIBLE FOR INJURIES TO PROPERTY OF OTHERS, resulting from the defective construction of its road, although constructed, as provided for by its charter, under the ordinances of the city, and the control of the city engineer. *Id.*
3. RAILROAD CONDUCTOR, IN EXCLUDING PERSON NOT ENTITLED TO REMAIN ON CARS, IS ACTING WITHIN SCOPE of his general authority, and the company is responsible for the manner in which he performs such duty. *Kline v. Central R. R. Co.*, 282.
4. CONDUCTOR IS BOUND TO EXERCISE REASONABLE CARE AND PRUDENCE IN REMOVING FROM CAR TRESPASSER, or one who is unlawfully upon it; and if he does not do so, and injury results, the company cannot be absolved from liability on the ground that the wrong was mutual. *Id.*
5. WHERE BOY SIXTEEN YEARS OLD SUES FOR DAMAGES FOR INJURY sustained by being forcibly expelled from a railroad car while in motion, and the testimony tends to show that he was told that he could not ride, and that he was ordered by the conductor, with a show of force, to get off the car, a nonsuit should not be granted. *Id.*
6. WHERE BOY ONLY SIXTEEN YEARS OLD LEAPS FROM RAILROAD CAR while in motion, in obedience to the conductor's command, accompanied by a show of force, the court cannot say judicially that his act was voluntary, but should leave it to the jury to say whether, under all the circumstances, the conductor's command did not amount to compulsion. *Id.*

See COMMON CARRIERS; DAMAGES; MASTER AND SERVANT; NEGLIGENCE.

REFEREES.

1. REFEREE HAS NO POWER TO REVIEW ACTION OF COURT UPON ORDER OF REFERENCE, deciding the principles upon which an account should be taken and settled; his duty is to take the account in pursuance of the principles thus settled. *Smith v. Walker*, 415.
2. ERRORS OCCURRING IN DETERMINING PRINCIPLES UPON WHICH ACCOUNT SHOULD BE TAKEN cannot be reviewed by the appellate court, on an application for a new trial, on the ground that the referee adopted and applied those principles in the adjustment of the accounts, but can only be corrected in a direct proceeding for that purpose. *Id.*

REGISTRATION.

- PURCHASER OF LAND IN POSSESSION OF THIRD PERSON MAY DEAL WITH IT on the presumption that the title is in fact as disclosed by the record, if he honestly and properly applies for information to the one in possession, as to his rights, and is willfully refused; and the latter will be estopped from setting up an unrecorded instrument to the injury of him to whom he refused the information. *Riley v. Quigley*, 516.

See DEEDS; MORTGAGES.

REPLEVIN.

1. REPLEVIN WILL NOT LIE AGAINST SHERIFF FOR SPECIFIC CHATTELS in his custody under a lawful writ commanding him to seize and hold that identical property. *Griffith v. Smith*, 90.
2. ONE CO-TENANT CANNOT MAINTAIN REPLEVIN AGAINST THE OTHER for the common property. And where he brings such action against his co-tenant, and fails on that ground, the defendant is entitled to a judgment for the return of the property. *Witham v. Witham*, 787.

RESTRAINT OF TRADE.

See CONTRACTS, 5-7.

ROBBERY.

See CRIMINAL LAW, 2, 10.

SALES.

1. SYMBOLICAL DELIVERY OF LARGE NUMBER OF LOGS landed on a stream, preparatory to driving, is sufficient delivery, even as against subsequent purchasers, where a survey of the logs is made by a person mutually agreed upon by the parties to the sale, and the vendee's mark is put upon the logs as they are thus landed, although the vendor is bound by the contract of sale to deliver the logs at a specified place which is many miles below the landing. *Bethel S. M. Co. v. Brown*, 752.
2. CONTRACT FOR SALE OF THREE HUNDRED BARRELS OF FLOUR, to be delivered in lots of one hundred barrels, each lot to be paid for on delivery, is severable, and delivery and receipt of payment for the last two lots do not constitute a waiver of any rights of the seller arising out of an unauthorized delivery of the first lot by a railroad company to the purchaser without payment made. *Sawyer v. Chicago & N. W. R'y Co.*, 49.
3. CONTRACT TO PAY PURCHASE PRICE OF LAND IN WHEAT OF CERTAIN QUALITY, at a specified price per bushel, in annual installments of a specified

amount, is equivalent to a contract for the sale of the amounts of wheat to be delivered at the times and price specified; the vendor is entitled to the wheat, or in default thereof, he may recover its actual value at the times specified for its delivery; and the vendee has no right to pay in money, instead of wheat, the amount of the purchase price. And more especially will this rule apply where the contract signifies the intention of the parties that the mode of payment shall not be at the option of the debtor, as where it provides that he may pay more in each year, provided that the additional payments shall be made in wheat at the stipulated price, or in cash, as the vendor may elect. *Starr v. Light*, 55.

4. **SELLER, UPON REFUSAL OF PURCHASER TO RECEIVE AND PAY FOR GOODS SOLD**, may keep the goods and recover by proper action the difference between their value at the time and place of delivery and the contract price; or he may sell them with due precaution and diligence, and then sue for and recover the difference between the price received and the contract price; or he may, upon making an actual or constructive delivery of the goods, recover the full contract price. *Webber v. Minor*, 688.
5. **READINESS OF AND OFFER BY SELLER TO DELIVER GOODS SOLD**, and refusal of the purchaser to receive them, do not constitute actual or constructive delivery, so as to entitle the seller to recover the full contract price. *Id.*
6. **TO CONSTITUTE CONSTRUCTIVE DELIVERY OF WOOD SOLD**, so as to entitle the seller to recover the contract price, he should set it apart for the purchaser, and relinquish his own control of it, at or as near to the place of delivery as is reasonably practicable. *Id.*
7. **IMPLIED WARRANTY OF ARTICLES MANUFACTURED UNDER EXECUTORY CONTRACT.** — In case of an executory contract for the manufacture of articles to be delivered at a future day, there is always an implied warranty that the articles delivered shall answer the purpose for which they were designed. *Woodle v. Whitney*, 102.
8. **VENDOR HAS RIGHT TO RETURN DEFECTIVE CORN CULTIVATOR, MANUFACTURED UNDER EXECUTORY CONTRACT, AND TO RECOVER MONEY PAID ON IT**, with interest, where he has received the cultivator under such contract, kept it long enough to give it a fair examination and trial, and found it to be vitally defective. *Id.*
9. **STOPPAGE IN TRANSITU IS RIGHT WHICH VENDOR OF GOODS** upon credit has to retake them, upon the discovery of the insolvency of the vendee, at any time before they have been delivered to him, or before any third person has acquired a *bona fide* right to them. *Jones v. Earl*, 338.
10. **UPON DEMAND BY VENDOR OF GOODS** upon credit, during continuance of the right of stoppage *in transitu*, the carrier becomes liable for conversion if he declines to deliver the goods to the vendor, or delivers them to the vendee. *Id.*
11. **NOTICE BY VENDOR OF GOODS CLEARLY INFORMING CARRIER** that it is the intention and desire of the former to exercise his right of stoppage *in transitu*, is sufficient to charge the latter. And notice to an agent of the carrier, who is in the possession of the goods in the regular course of his agency, is notice to the carrier. *Id.*
12. **LOUISIANA COURT WILL RECOGNIZE RIGHT OF STOPPAGE IN TRANSITU** arising from a sale of goods in New York to a vendee in New Orleans, who becomes insolvent before the goods are delivered. *Bhun v. Marks*, 725.

13. CLAIM OF VENDOR TO EXERCISE RIGHT OF STOPPAGE IN TRANSITU is superior to the lien of attaching creditors, when the former shows that he had the right of stoppage, and duly exercised it. *Id.*
14. VENDOR MAY EXERCISE RIGHT OF STOPPAGE IN TRANSITU when he proves that at the time of the sale he was not aware of the insolvency of the vendee; and the discovery of such insolvency before delivery entitles him to exercise the right, though the goods are attached by creditors of the vendee. *Id.*

See STATUTE OF FRAUDS.

SEDUCTION.

1. EVIDENCE OF PLAINTIFF'S ADULTERY IS ADMISSIBLE IN MITIGATION OF DAMAGES, BUT NOT AS BAR TO ACTION, where such plaintiff and husband sue another for damages for a criminal intimacy with the wife of the former. *Rea v. Tucker*, 539.
2. DEFENDANT MAY PROVE, IN MITIGATION OF DAMAGES, THAT WIFE OF PLAINTIFF HAD BEEN GUILTY OF ADULTERY with other persons before her connection with the defendant, where the plaintiff and husband have brought suit against her seducer for damages. *Id.*
3. EVIDENCE AS TO CONDITION IN LIFE AND PECUNIARY CIRCUMSTANCES OF RESPECTIVE PARTIES IS ADMISSIBLE in an action for the seduction of either a wife or daughter. *Id.*
4. EVIDENCE OF COLLUSION IS BAR TO ACTION WHEN, AND WHEN NOT. — Where a former husband brings suit against the seducer of his divorced wife for damages resulting from such seduction, and the offense of the defendant was the result of collusion between the plaintiff and his wife, or of connivance on the part of the plaintiff, evidence of such collusion would bar the action; but evidence of collusion between the husband and wife in bringing the suit is not admissible in bar of such action. *Id.*

SHIPPING.

1. MASTER OF VESSEL BECOMES OWNER PRO HAC VICE, and not a partner of the owner, where he sails her under a contract at the halves, — he to victual and man her, and the owner to have half of her earnings. And the freight money earned during the continuance of such contract belongs to the master alone, and may be held under a timely foreign attachment against him. *Bridges v. Sprague*, 788.
2. MASTER'S RIGHT TO SELL VESSEL IN IMMINENT DANGER OF BECOMING TOTAL LOSS arises from the necessity of acting before the owners can be consulted. *Gates v. Thompson*, 782.
3. SALE BY MASTER OF VESSEL OF SUCH PARTS OF HER AS BELONG TO PART OWNERS who might have been notified of her peril in time to act in the matter before the sale, but who were not so notified, is void. *Id.*
4. MASTER MAY SELL WHOLE OR PART ONLY OF VESSEL, according to the extent of his authority. *Id.*

See ATTACHMENTS, 6.

STATUTE OF FRAUDS.

1. CONTRACTS FOR SALE OF GROWING PERIODICAL CROPS ARE NOT CONTRACTS for sale of interest in land, within the meaning of the statute of frauds, and need not be in writing, to give them validity. Nor is this rule affected

in California by the circumstances, that, by the terms of the contract, the purchaser is to have possession of the land for the purpose of raising the crop, and harvesting it when matured. *Davis v. McFarland*, 340.

2. **GROWING CROP, UNTIL READY FOR HARVEST, CANNOT**, by itself, become object of delivery, and can only be delivered into the possession of the vendee, by delivering to him the possession of the land also, of which it is a part. And a chattel thus situated is not regarded as within the meaning of the statute of frauds, of which a sale, in order to be valid, as against the creditors of the vendor, must be accompanied by an immediate delivery and continued change of possession. *Id.*

See *WATKINS*, 4.

STATUTE OF LIMITATIONS.

1. **LOAN OF MONEY "TO BE PAID WHEN CALLED FOR," IS DUE** when the loan is made, and the statute of limitations begins to run from that time. *Ware v. Henry*, 780.
2. **PRESCRIPTION RUNS AGAINST ALL PERSONS**, unless they are included in some exceptions established by law. War is not among such exceptions: *Ludeling, J.*, on rehearing. *Smith v. Stewart*, 709.
3. **INABILITY TO SUE WILL NOT PREVENT** the running of prescription: *Ludeling, J.*, on rehearing. *Id.*
4. **MAXIM, "CONTRA NON VALENTEM AGERE NON CURRIT PRESCRIPTIO,"** does not prevail in Louisiana, except in the cases named in the code: *Ludeling, J.*, on rehearing. *Id.*
5. **RESIDENT OF STATE ENGAGED IN REBELLION IS NOT TO BE REGARDED AS ALIEN ENEMY**, and subject to the disabilities thereof, so that the statute of limitations would be suspended in his favor, where he remained loyal to the United States, and left the state immediately after the commencement of the war, with the intention of returning at its close, his family meanwhile residing there, and resided during the continuance of the war on loyal or neutral ground. *Zacharie v. Godfrey*, 506.
6. **AS BETWEEN CESTUI QUE TRUST AND TRUSTEE OF EXPRESS TRUST**, the statute of limitations does not run so long as the trust continues. *Miles v. Thorn*, 384.
7. **PERIOD OF LIMITATION TO ACTION UPON PROMISSORY NOTE IS NOT EXTENDED** by giving with the note a warrant of attorney under seal, and such warrant confers no authority to enter judgment upon the note after the latter is barred. And a judgment so entered should be set aside, although the plaintiff does not show merits. *Walrod v. Manson*, 187.
8. **VALID AGREEMENT NOT TO SUE UPON DEMAND** until the happening of a particular event suspends the running of the statute of limitations until such event occurs. *Smith v. Lawrence*, 344.
9. **AGREEMENT, FOR VALUABLE CONSIDERATION, TO FORBEAR TO SUE** upon demand until the happening of a particular event, is valid, though it be not signed by the debtor, if it does not provide for the performance of any act by him. *Id.*
10. **UPON DEMURRER ON GROUND THAT ACTION IS BARRED** by statute of limitations, if the complaint fails to show whether the contract sued on was verbal or in writing, it will be presumed to be in writing for all the purposes of the demurrer. *Miles v. Thorn*, 384.

See *ADVERSE POSSESSION*.

STATUTES.

STATUTE CONTAINING TWO INCONSISTENT PROVISIONS MUST BE CONSTRUED so as to effect the legislative intention. *Lindley v. Oress*, 610.

See CORPORATIONS, 17.

SURETYSHIP.

See RAIL.

TAXATION.

1. **WISCONSIN STATUTE PROVIDING THAT ANY TAX OR ASSESSMENT WHICH HAS BEEN SET ASIDE**, by reason of irregularities or defects, may be reassessed, etc., has no application to a case where the tax or assessment was not authorized by law. *Dean v. Charlton*, 205.
2. **COURT OF EQUITY WILL INTERFERE BY INJUNCTION TO RESTRAIN COLLECTION** of an illegal and void special assessment, though there is nothing to show it to be inequitable. *Id.*
3. **ILLEGAL ASSESSMENT — CONDITIONS OF EQUITABLE RELIEF.** — A special tax was assessed on the plaintiff's lots for grading and paving a street. The contract for grading was legal, but that for paving was illegal. In this action to enjoin the collection of the tax, *held*, that the plaintiff was not required, under the circumstances, to pay the expense of the grading as a condition of relief against the assessment for paving. *Id.*

See ADVERSE POSSESSION, 2; **CORPORATIONS**, 26; **ESTOPPEL**, 12.

TRESPASS.

See DAMAGES, 2, 3; **EXECUTIONS**, 30.

TRUSTS.

EXPRESS TRUST. — Where, by agreement, two parties obtained a road franchise in the name of one upon a bill drawn by the other, and each of them constructed one half of the road, and the one in whose name the franchise stood took possession and collected the tolls on their mutual account, on the understanding that they were to share equally therein, it was held that an express trust was created, of which the party in possession was the trustee. *Miles v. Thorn*, 384.

See CHAMPERTY; FRAUDULENT CONVEYANCES, 7; **HUSBAND AND WIFE**, 3; **STATUTE OF LIMITATIONS**, 6.

UNINCORPORATED SOCIETIES.

MEMBERS OF COMMITTEE OF VOLUNTARY ASSOCIATION ARE INDIVIDUALLY LIABLE on a contract made by a subcommittee of their number, under authority delegated by the whole committee, with one who contracted on the credit of the committee personally, and not of the association, although, in making the contract, the subcommittee assumed to act as officers of the association. *Fredendall v. Taylor*, 203.

USAGE.

See COMMON CARRIERS, 6.

VENDOR AND VENDEE.

1. **DESCRIPTION OF PREMISES IN CONTRACT TO CONVEY LAND WHEN SUFFICIENT.** — In a written contract for the sale of land, the premises were

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described as "the east $\frac{1}{2}$ of N. W. $\frac{1}{4}$, sec. 27, T. 38, 14 E. of 3d P. M." The range and the position of the land to the base line were omitted. *Held*, that this description was sufficient, because a reference to the government land surveys would show that there is no township 38 south of the base line and 14 east of the 3d P. M., and hence, it must be north of the base, and in 14 east of said meridian, which would locate the land in Cook County. *White v. Hermann*, 543.

2. **CONTRACT FOR CONVEYANCE OF LANDS IS GOOD AND BINDING, IF THEIR DESCRIPTION IS SUFFICIENT** to enable a surveyor to locate them; and this is a question for the jury, to be determined from the evidence, unless it is manifest from the instrument that such lands cannot be located. *Id.*
3. **COURT WILL NOT PERMIT CONTRACT FOR CONVEYANCE OF LAND TO FAIL**, when, from the entire instrument and the general acts of the government, it can be seen what was intended by the parties. *Id.*
4. **PATENT AMBIGUITY IN WRITTEN CONTRACT FOR CONVEYANCE OF LANDS CANNOT BE EXPLAINED BY EXTRINSIC EVIDENCE.** *Id.*
5. **VALUE OF PREMISES IN ACTION TO RECOVER DAMAGES FOR BREACH OF CONTRACT TO CONVEY LAND MAY BE PROVED BY PLAINTIFF, NOT ONLY BY SHOWING** the worth of other property of equal value adjacent to that in controversy, at or near the date of the instrument, but even the value of lands of a different quality, lying in the immediate vicinity, leaving it for the jury to determine the difference in value. *Id.*
6. **SELLER OF LAND, PROCURING THIRD PERSON HOLDING LEGAL TITLE TO MAKE DEED, LIABLE AS GRANTOR.** — Where a person who has purchased land, but has not yet procured a conveyance, desires to sell it to another, and when he proceeds to do so, suggests that, to save writing, the purchaser take a deed directly from the person holding the legal title, which suggestion is adopted, and it afterwards transpires that there was a mortgage on the land, which the purchaser had to pay, he can recoup this amount upon a note which he has given to the person from whom he has purchased, and who induced him to take the conveyance from the third person. *Brown v. Crowley*, 462.
7. **ONE WHO SELLS LAND, AND INDUCES HIS PURCHASER TO TAKE DEED FROM THIRD PERSON** holding the legal title, may be shown by parol testimony to have been the real grantor, and will be held to all the obligations attached to that relation, including an obligation to make a good title. *Id.*
8. **ASSIGNMENT OF NOTE GIVEN FOR PURCHASE-MONEY for land conveyed by deed does not transfer the vendor's lien therefor.** *Simpson v. Montgomery*, 228.

See DEEDS; HOMESTEADS, 5.

WAR.

1. **BELLIGERENTS AND BELLIGERENT RIGHTS** are properly applicable only to sovereign powers engaged in war. In all other cases they apply *sub modo*, and in a limited and qualified sense. In case of rebellion, where one party strives to obtain independence, and the other to reduce the insurgents to obedience, no such recognition occurs. Yet in the latter case a concession to the extent of humane treatment and exchange of prisoners is recognized as a belligerent right in favor of the insurgents. *Smith v. Stewart*, 709.

2. **BLOCKADE OF SOUTHERN PORTS** and exchange of prisoners during civil war, by the United States government, though the exercise of a belligerent right, cannot be construed into a recognition by the federal government of the Confederate States as a belligerent power or *de facto* government. *Id.*
3. **FACT THAT CONFEDERATE STATES WERE BELLIGERENT POWER** did not constitute them a government *de facto*, nor did they attain that *status* because they established a government of their own and exercised jurisdiction over the country which they embraced. *Id.*
4. **GOVERNMENT DE FACTO ARISES ONLY** where the established government has been subverted by successful rebellion, and the new government exercises undisputed sway for the time over the whole country, or where the people of any portion of a country subject to the same government throw off their allegiance to that government and establish one of their own, and show, not only that they have established it, but their ability to maintain it. *Id.*
5. **RECOGNITION OF GOVERNMENT OF REVOLTED STATE** or province by a neutral power is *casus belli* for the power claiming dominion over the revolted country, if such recognition precedes the exhibition by the newly formed government of its ability to maintain its independence. *Id.*
6. **GOVERNMENT OF CONFEDERATE STATES** did not attain *status* of a government *de facto*. The authority set up by them was illegal and void. *Id.*
7. **MILITIA OFFICER ACTING UNDER PROCLAMATION OF GOVERNOR** directing the burning of all cotton in danger of falling into the hands of federal officers, unless it could be removed out of their reach, is liable for such cotton as he burned not in immediate and imminent danger of such capture, thus depriving the owner of the privilege of removal, if he were able to do so. *Id.*
8. **MILITARY ORDER DIRECTING BANK TO MAKE STATEMENT** of deposits therein belonging to army officers of the Confederate States, and also directing the bank to pay to the proper officer of the quartermaster's department all money in its possession belonging to, or standing upon the books to the credit of, such officers, is an attempt on the part of the military authorities to sequester such money; but if the money paid over is confederate currency, it is not a sequestration so as to exonerate the bank from liability for a deposit made in lawful money. *Nelligan v. Citizens' Bank*, 734.
9. **PAYMENT BY BANK IN CONFEDERATE MONEY**, to officers of United States under military order, of a deposit in lawful money, made in such bank by a confederate officer, does not discharge the bank from liability for payment of the deposit upon demand. *Id.*

See EVIDENCE, 6; STATUTE OF LIMITATIONS, 15.

WAREHOUSEMEN.

1. **WAREHOUSEMAN'S RECEIPT IS CONTRACT OF PARTIES** as to the property stored, and parol evidence is inadmissible to change or vary its terms. *Leonard v. Dunton*, 568.
2. **ASSUMPSIT WILL LIE AGAINST WAREHOUSEMAN** for damages for breach of his contract to deliver, on demand, wheat stored with him; and though trover might also lie, the rule that a party cannot waive the tort and sue in *assumpsit* for money had and received, unless money has actually been received, has no application to such a case. *Id.*

2. **MEASURE OF DAMAGES AGAINST WAREHOUSEMAN** used in *assumpsit* for breach of his contract, in failing to deliver on demand wheat stored with him, is the value of the wheat at the time it should have been delivered. *Id.*
4. **WHEN WAREHOUSEMAN RECEIVES WHEAT AND STORES IT**, agreeing to keep it for a short time without charge, and deliver it on demand, and is afterwards sued in *assumpsit* for damages in failing to deliver, the action is not defeated by a neglect or refusal to pay storage after the demand to deliver is made. In such case, the warehouseman is entitled to storage only after notice that it would be charged is given. *Id.*
5. **WAREHOUSEMAN IS ESTOPPED FROM DENYING DESCRIPTION OF PROPERTY IN RECEIPT**, so far as it relates to matters which are or ought to be within his knowledge or that of his agents; but not in respect to matters not open to ordinary inspection, and visible, and where a local custom requires that the kind of property described in the receipt must, for the purpose of purchase and sale, either have a well-known brand, or be inspected, as a condition of purchase, and that purchasers rely on the warehouse receipt only for custody, and not for quality or kind. *Hale v. Milwaukee Dock Co.*, 160.

WATERS.

1. **LEGISLATIVE ACT OR CITY ORDINANCE FORBIDDING VESSELS TO DRAG THEIR ANCHORS IN NAVIGABLE STREAM** IS INVALID so far as it interferes with the rights of navigation secured by the ordinance of 1787. *Milwaukee G. L. Co. v. Gamecock*, 138.
2. **RIGHTS OF NAVIGATION ON NAVIGABLE RIVER WITHIN LIMITS OF CITY ARE PARAMOUNT** to the right of a city gas-light company to lay its pipes across the bed of such river. *Id.*
3. **IT IS RIGHT OF VESSEL ON NAVIGABLE RIVER WITHIN LIMITS OF CITY** to be towed up or down the river by a steam-tug, and where that is the usual or convenient method, to be so towed stern foremost and with an anchor dragging at the prow. *Id.*
4. **GAS COMPANY CANNOT RECOVER IF THEIR GAS-PIPES IN BED OF NAVIGABLE RIVER WITHIN LIMITS OF CITY ARE INJURED BY ANCHOR** of vessel being towed up or down the river, and without negligence on the part of those managing the vessel. But they can recover if there was such negligence. *Id.*
5. **RIGHT OF PUBLIC IN NAVIGABLE OR FLOATABLE STREAM IS LIMITED**, in general, by its banks, which are the boundaries within which the common right must be confined. *Hooper v. Hobson*, 769.
6. **LOG-OWNERS ARE LIABLE TO RIPARIAN PROPRIETOR FOR DAMAGES** done by them in traveling upon the banks of a floatable stream for the purpose of driving their logs. *Id.*
7. **CONSTRUCTION OF GRANT OF WATER-POWER THAT WILL RESTRICT GRANT** to the specific use to which the water was applied when the grant was made will never be adopted, unless the language of the grant unmistakably shows that such was the intention of the parties. *Hines v. Robinson*, 772.

See CO-TENANTY.

WAYS.

1. **OWNER OF LAND WHO SELLS HALF OF IT, RESERVING RIGHT OF WAY** across it, and in the same deed granting to the vendee a right of way

across the unroled leaf, does not thereby create rights which are assumed or appurtenant to the respective tenets as to pass with the title. *Wagoner v. Hanna*, 354.

2. WHETHER GRANT OF RIGHT OF WAY BE IN GRANT OR APPURTEINANT to some other estate must be determined from the grant itself, and not by matter outside. *Id.*
3. RIGHT OF WAY IS EASEMENT, only when it appears in the grant to be made for the benefit of a dominant tenement which is described therein. *Id.*
4. RIGHT OF WAY IS INTEREST IN LAND WITHIN STATUTE OF FRAUDS, and hence transferable only by an instrument in writing, which describes the interest conveyed. If it be appurtenant, the instrument must so describe it, and must include a description of the tract of land to which it is annexed. *Id.*

WILLS.

1. WHAT IS NOT WILL.—Memorandum of advancements made by a deceased, no matter how strictly kept or clearly proved, nor his dying words spoken in the presence of all his family, no matter how just, unless it can be proved as a will, can receive no notice from the courts. *Sims v. Sims*, 450.
2. MEMORANDA OF ADVANCEMENTS KEPT BY DECEASED ARE EVIDENCE OF FACT OF ADVANCEMENT, and are *prima facie* evidence of its value, but they are in no sense a will. *Id.*
3. INSTRUMENT EXTERIALLY WRITTEN, DATED, AND SIGNED by the testator is clothed with all the formalities of law required to constitute a valid olographic will. *Kirschberg's Succession*, 729.
4. ONE MAY DISPOSE OF HIS PROPERTY BY WILL in any manner whatever, whether he institutes an heir or only names legatees. *Id.*
5. WHEN, FROM TERMS OF WILL, the intention of the testator cannot be ascertained, recourse must be had to all circumstances which may aid in the discovery of his intention. *Id.*
6. EXECUTION OF LOST WILL MUST BE PROVED BY THREE SUBSCRIBING WITNESSES, if in life, and within the jurisdiction of the court, as in the case of the probate of a will in solemn form. *Kitchens v. Kitchens*, 453.
7. PROOF OF LOSS OF WILL, AND THAT IT WAS NOT REVOKED.—After the execution of a missing will has been duly proved, its destruction or loss, and the facts necessary to rebut the presumption that it had been revoked by the testator, may be proved by such evidence as satisfies the conscience of the jury. *Id.*
8. PROOF THAT LOST WILL HAD NOT BEEN REVOKED BY TESTATOR MUST BE VERY CLEAR AND STRONG. But as in all other cases where there is a conflict, the jury must determine. *Id.*
9. VALID WILL MAY BE EXECUTED by any one having the soundness and strength of mind necessary to make a contract. *Chandler v. Barrett*, 701.
10. WHEREIN WILL CONTAINS SERIES OF WISE and judicious dispositions, it is for those who attack it to prove unsoundness of mind in the testator at its execution. *Id.*
11. WHEREIN WILL CONTAINS DISPOSITIONS, such as would cause insanity to be presumed, although susceptible of being justified by peculiar circumstances, it is for the legatee to prove the sanity of the testator as against the terms of the will. *Id.*

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12. **IF FACTS OCCURRING NEAR TIME OF DATE** of will, and preceding and following it, prove an habitual state of insanity, then, notwithstanding the wisdom of the act, the supporters of the will must prove soundness of mind in the testator during the intermediate time. *Id.*
13. **IF ACTS OF INSANITY ON PART OF TESTATOR** were rare, and occurred at periods distant from each other, and from the date of the will, it will sustain itself, and be presumed to have been made in a lucid interval, at least if the will is not destitute of good sense, and betrays no insanity. *Id.*
14. **INSANITY IN TESTATOR IS NEVER PRESUMED.** Neither old age, forgetfulness of family, largeness of the legacy, nor low rank of the legatee, will of themselves show insanity in the testator. *Id.*

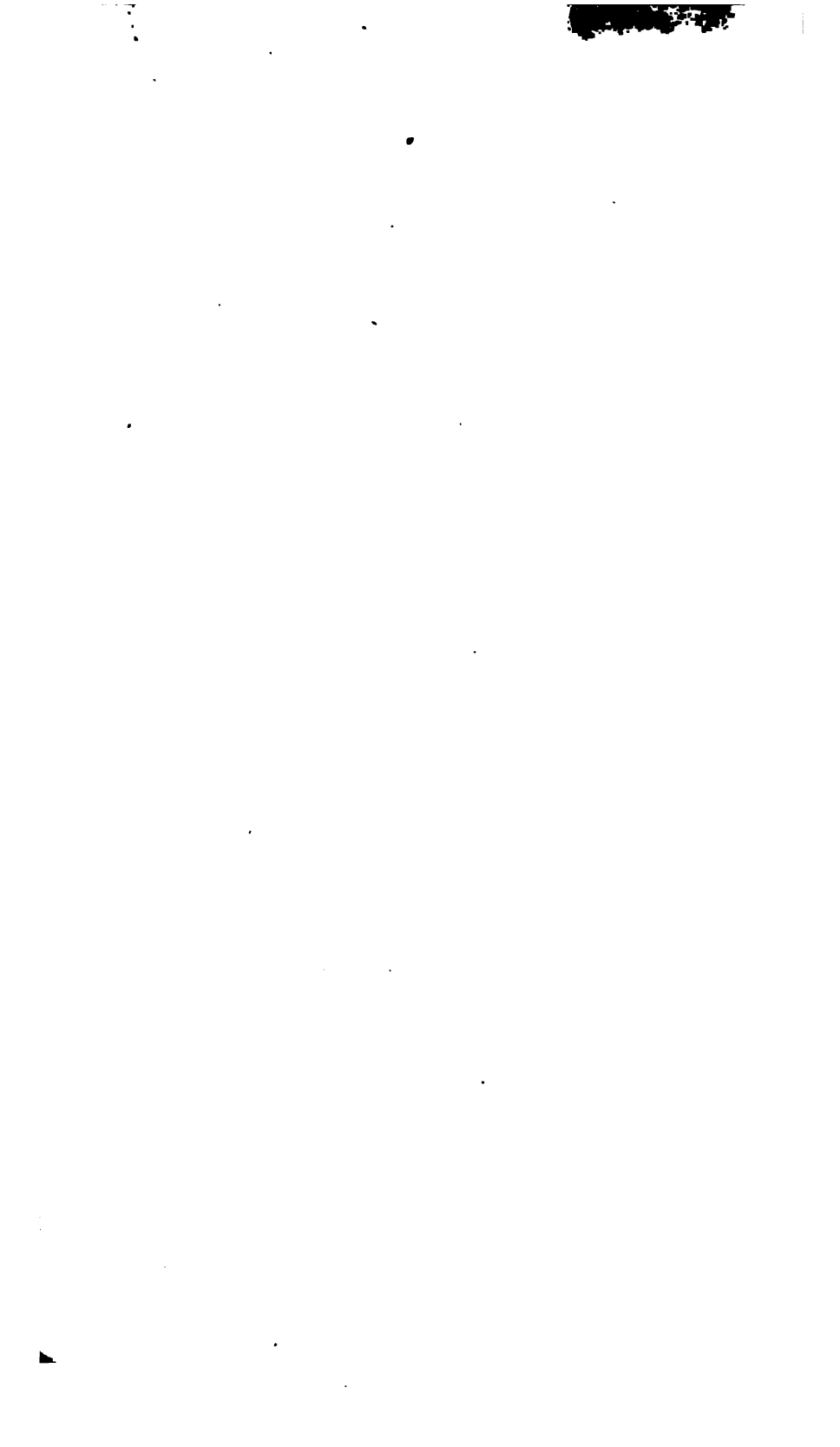
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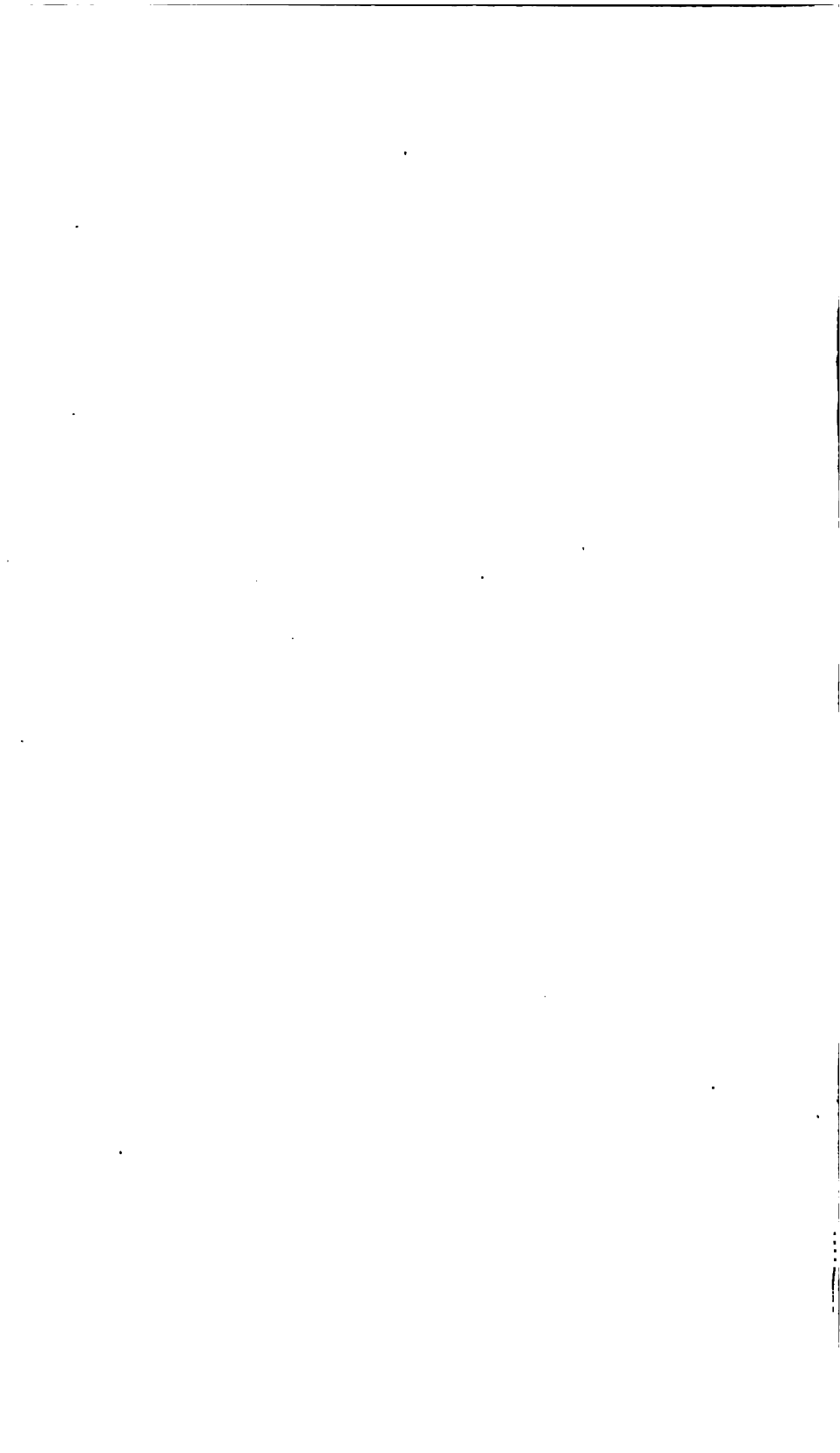
1. **PARTY TO SUIT CANNOT BE SWORN AND EXAMINED AS WITNESS IN HIS OWN BEHALF WITHOUT NOTICE** of his intended examination having been given: See Wisconsin Laws of 1863, chapter 17. *Milwaukee G. L. Co. v. Gamecock*, 138.
2. **DIVORCED WIFE IS INCOMPETENT TO TESTIFY IN BEHALF OF HER FORMER HUSBAND** in a suit brought by him against one who had criminal conversation with his wife. *Rea v. Tucker*, 539.
3. **WHO MAY TESTIFY AS TO VALUE OF PROPERTY.** — In an action to recover damages for breach of contract to convey lands, where it is sought to prove their value by showing the worth of adjacent lands, either of the same or of a different quality, any person knowing the property and its value may testify upon that question. The proof of value need not be confined to persons only who are engaged in buying and selling real estate. Such knowledge is not scientific, and is not confined to a few experts. *White v. Hermann*, 543.
4. **NUMBER OF WITNESSES WHO MAY BE CALLED TO PROVE VALUE OF PROPERTY IS NOT LIMITED**, where that is the issue in the case, either by the power of the court, or by a statute providing that the costs of four witnesses only shall be taxed against the unsuccessful party, unless the court certifies that a greater number is necessary. A party may call a larger number if he is willing to risk the liability to pay their fees. Witnesses may differ materially upon the question of such value, and it is error for the court to refuse to permit a party to call more than four witnesses to prove it; but it may of course exercise a sound discretion, whether it will certify to the necessity of more than four witnesses, and if so, to what number. *Id.*
5. **PROOF OF HANDWRITING.** — The rule requires that a witness called to prove handwriting shall testify from having seen the person write, or from a knowledge of his hand acquired from writings acknowledged by the party. *Bruce v. Crewe*, 467.
6. **WITNESS INCOMPETENT TO PROVE HANDWRITING.** — A witness called to prove a person's handwriting, who has never seen the party write, and whose knowledge of his hand was derived from having read letters which came to a business house in which he was a clerk, purporting to come from the party, but which letters were not in reply to any letters witness had written or seen written, is incompetent. His knowledge is simply hearsay. *Id.*

7. **INCOMPETENT TO PROVE HANDWRITING IN MISSING LETTER.** — A witness called to prove a copy of a lost letter claimed to have been in the handwriting of a certain person cannot be shown letters already proven to have been written by such person, and testify whether the lost letter was in the same hand. This is not the case of an expert testifying from a comparison of papers all before the court, but a case of educating the witness up to the point of competency. *Id.*
8. **EXPERTS MAY GIVE OPINIONS, AND THOSE OF PHYSICIANS** are received upon questions of professional skill, but they must state the facts upon which the opinions are based, and they must be weighed as other evidence, and are not conclusive. *Chandler v. Barrett*, 701.









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